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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 273

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, as Owner of the American Steamship *HAWAIIAN*,

Petitioner,

against

THE UNITED STATES OF AMERICA,

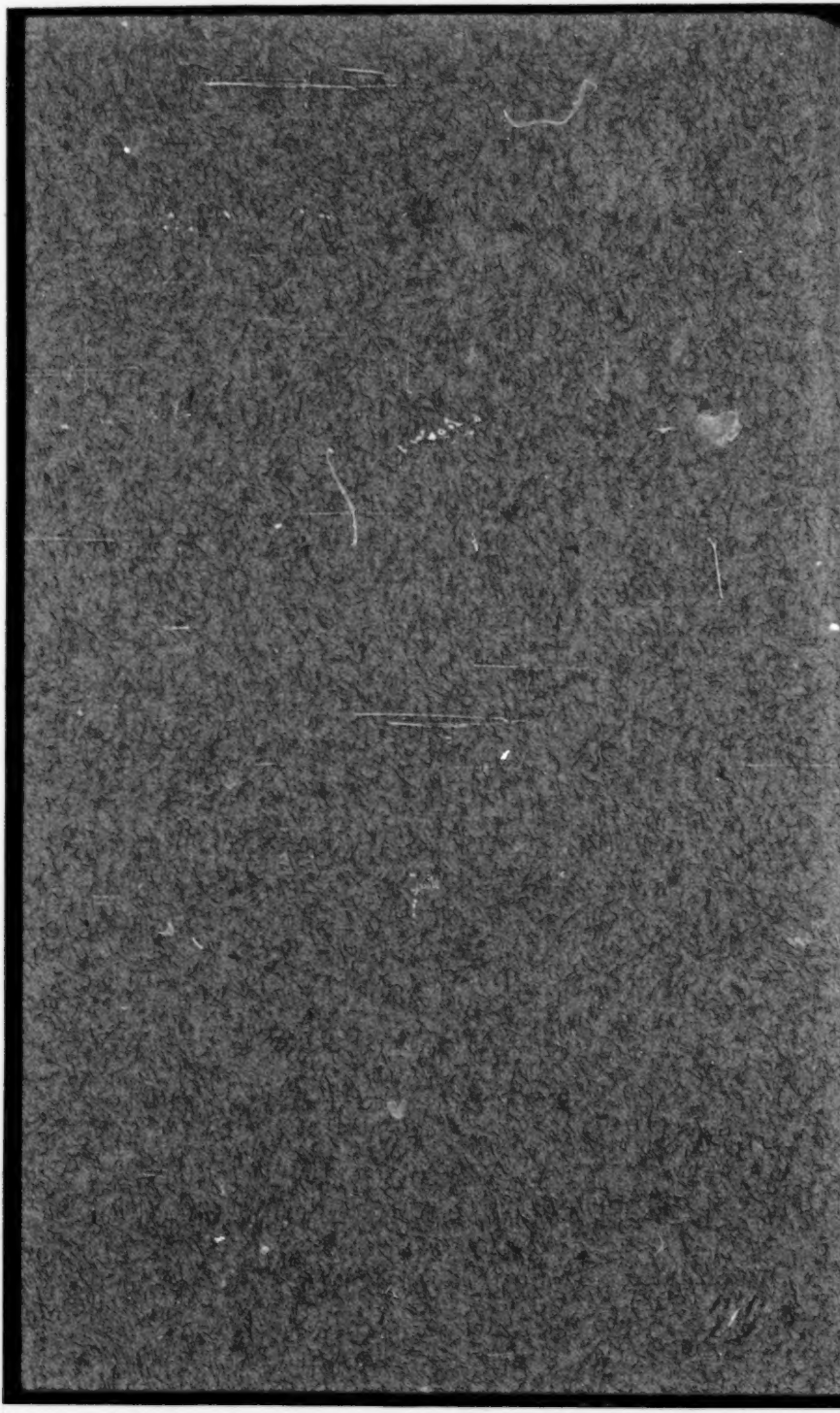
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND APPENDIX TO PETITION.

CLEMENT C. HOUGHTON,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

KIRLIN, CAMPBELL & KEATING,
Attorneys for Petitioner.

Parmelee Printing Co., 27 Thomas St., New York 13, N. Y. WO 4-4



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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

The petitioner, American-Hawaiian Steamship Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in a suit by plaintiff (Docket No. 48758) to recover just compensation for the requisitioned use of petitioner's steamship *Hawaiian*. (App.* 117).

* The references to "App." in this petition are to the pages in the "Appendix" to this petition which contains copies of the commissioner's report, findings of fact, conclusion of law, opinion and judgment of the Court of Claims. In accordance with Rule 21(1) of this Court, the original record on file in the Clerk's office of the Court of Claims has been certified and transmitted to this Court as provided by Rule 57(d) of that Court. The Appendix also contains certain portions of the evidence of record which are referred to in this petition.

OPINION BELOW.

The judgment of the Court of Claims was rendered on the basis of an opinion, findings of fact and conclusion of law announced by the Court on October 5, 1954. The opinion, findings and conclusion are printed in the "Appendix" to this petition at pages 79-117 and are officially reported at 129 C. Cls. 365. The opinion is unofficially reported at 124 F. Supp. 378 and 1954 A. M. C. 2214.

GROUNDS OF JURISDICTION.

The judgment sought to be reviewed was dated and entered on March 16, 1955 (App. 117-8). A motion for rehearing was filed by defendant on March 25, 1955 and was denied by the Court of Claims on May 3, 1955 (App. 118).

Jurisdiction of this Court to review judgments of the Court of Claims by writ of certiorari is provided by Section 1255 of Title 28, U. S. Code.

QUESTIONS PRESENTED.

1. This case presents the important constitutional question specifically reserved by this Court in *United States* v. *Felin & Co.*, 334 U. S. 624 at 646, whether, consistently with the Fifth Amendment to the Constitution, just compensation for the taking of private property for public use (such property being in this case the petitioner's freight steamer *Hawaiian*), may be limited by schedules of prices (in this case such schedules being maximum time charter rates for the use of vessels), which requisitioning

agencies of the government (in this case the United States Maritime Commission and its successor agency, the War Shipping Administration) fixed at levels about 50% below fair market prices which had been approved by those agencies immediately before promulgation of the first schedules, *notwithstanding the fact that such schedules were issued for the predominant purpose of later acquiring the use of the property affected by such price-fixing?*

2. A further important constitutional question presented is whether, if a rate for the use of a ship has been fixed by a government agency under conditions described in the first question and has been accepted by the shipowner, under conditions of compulsion, as compensation for the use of the ship on "time charter basis" under a requisition which has terminated, such acceptance gives such rate any lawful effect as a limitation upon or as a measure of just compensation for a subsequent requisition of the use of the ship upon a "bareboat basis"*?

3. Further novel and important questions of constitutional and administrative law are raised by the holding of the Court of Claims that the ship charter rate "restrictions" imposed by the ship requisitioning agencies in administering the so-called "Ship Warrants Act" (Act of July 14, 1941; 55 Stat. 591; 50 War App. U. S. C. Secs.

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* Requisition on "bareboat basis" means that the government took over the entire possession and operation of the vessel. (See Finding 9, App. 92.) This contrasts with the prior requisition on "time charter basis" under which the shipowner retained possession and operation of the vessel and paid for crew, supplies, repairs and insurance (except war risk insurance). (See also Finding 9, cited above.)

1281-6) reduced the value of the use of the *Hawaiian* for purposes of just compensation considerably below the levels to which petitioner would otherwise have been entitled. The questions presented include the following:

a. As the schedules of maximum rates of charter hire promulgated by those agencies in administering the Act were admittedly far below current fair and reasonable market rates, did the Act nevertheless authorize those agencies to impose such schedules as lawful conditions required to be observed by ship operators in order to obtain and keep licenses (warrants) to procure goods and services essential to the operation of their ships?

b. Whether a statute entitling an administrative agency to attach conditions to the issuance of licenses needed for the procurement of goods and services essential to the operation of vessels or other private property affected, entitles such agency to dispense with the requirements of due process of law and of just compensation established by the Fifth Amendment to the Constitution and to issue such licenses only on condition that the licensees undertake to operate their property for such purposes and at such prices as the administrative agency may determine.

c. Even if it be assumed that such agency price schedules could be legally binding on such property-owners as may have given undertakings to observe them as a condition of obtaining licenses, can such schedules lawfully be considered a part of the surrounding circumstances to be given effect in determining just compensation for the use of requisitioned property belonging to the petitioner which never did give such an undertaking?

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The case involves: the Fifth Amendment to the Constitution of the United States; the requisition section (Sec. 902) of the Merchant Marine Act, 1936, as amended (49 Stat. 2015, 53 Stat. 1254; 46 U. S. C. Sec. 1242) and the so-called Ship Warrants Act (Act of July 14, 1941, P. L. 173, 77th Congress, 55 Stat. 591; 50 War App. U. S. C. Secs. 1281-1286).

The verbatim text of such portions of the Fifth Amendment to the Constitution as are specifically involved, is as follows:

> "* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The verbatim text of the two statutes involved is set forth in Part II of the Appendix to this brief. (Pp. 119-124)

STATEMENT OF THE CASE.

This is a suit to recover just compensation for respondent's use of petitioner's American freight steamer *Hawaiian* (a vessel of 9640 tons deadweight capacity), from July 7, 1943 to May 1, 1946 while under requisition on bareboat basis* by the War Shipping Administration pur-

* On May 25, 1942, the *Hawaiian* had been requisitioned on "time charter basis" and petitioner subsequently executed a requisition time charter party (Def's. Ex. 2) which was terminated, however, when the requisition on "bareboat basis" occurred. The meaning of "time charter basis" and of "bareboat basis" is defined in the footnote on p. 3, *supra*.

suant to Section 902 of the Merchant Marine Act, 1936, as amended. (Finding 1; App. 87) Jurisdiction of the Court of Claims over such suits is specifically provided by Section 902(d) of that Act. (App. 119-121)

The War Shipping Administration offered and petitioner declined compensation at the rate of $1.28 per deadweight ton per month, representing a basic rate of $1.25 and an additional 3¢ allowance for the vessel's speed which exceeded twelve knots. (Findings 2 and 4; App. 87, 89) As provided by Section 902(c) of the above Act, petitioner was paid 75% of the offer. (Finding 3; App. 88)

The rate offered to petitioner was prescribed by General Order No. 37, issued April 7, 1944, by the War Shipping Administration to fix schedules of compensation under a revised requisition program adopted in 1943, after a dispute between the Comptroller General of the United States and the Administrator. (Findings 27 and 28; App. 108-111) As will appear later, there had been three previous rate schedules of the War Shipping Administration or its predecessor, the United States Maritime Commission.

Petitioner's Case Below.

Evidence of the actual fair market value of the *Hawaiian's* use during the requisition period was unavailable because no free market existed in the United States at the time. The use of all large, ocean-going freighters, such as the *Hawaiian,* had been requisitioned by the War Shipping Administration in 1942. Unless lost or requisitioned for title meanwhile, such vessels continued in the service of the government, under one form of requisition of use or another, until returned to their owners in 1946. (Finding 6; App. 90)

In the absence of an actual contemporaneous market, petitioner proved the probable fair market value of the use of the *Hawaiian* under the requisition by establishing that:

a. The actual fair market value of the use of the *Hawaiian* and of similar large American freighters engaged in foreign commercial trade* (shown by accounts covering many hundreds of voyages) was from $5.00 to $6.00 per deadweight ton per month before government intervention in the shipping market occurred in 1941 and until requisition occurred in 1942; (Findings 8, 11-16, App. 91, 94-98; Commissioner's Findings 7, 8, 11-17, App. 43-45, 47-54; Pl. Exs. 27, 29, 30, 38, 39, 40, 48, 48a, 64; Def's Ex. 17).

b. Throughout the requisition period, continuance of favorable economic conditions would have caused the *Hawaiian's* earning power and use value to remain at a level *at least* as high as it had been in 1941; (Findings 7, 8, 17, App. 90-2, 99; Commissioner's Findings 8, 18, App. 44-5, 54-5).

c. Earnings at such level were actually realized by the War Shipping Administration itself from employment of part of its requisitioned fleet in commercial operations in 1943 and 1944; (Commissioner's Finding 19, App. 55-6; Pl. Ex. 31) and

d. A comparable level of earnings was realized by petitioner in post-requisition berth operations in 1946. (Commissioner's Finding 20, App. 56; Pl. Ex. 33)

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* Petitioner's fleet was then mostly in foreign trade (Finding No. 10). As that was the "highest and most profitable use", just compensation would be measured by the value of vessels employed in that trade. *Boom Company* v. *Patterson*, 98 U. S. 403; *United States* v. *New River Collieries Co.*, 262 U. S. 341; *Olson* v. *United States*, 292 U. S. 246, 255; *United States* v. *Toronto, etc. Nav. Co.*, 1949, 338 U. S. 396, 405.

The actual causes of the pre-requisition levels of American freighter earnings of $5.00 to $6.00 per deadweight ton per month were the increased volume and higher class of traffic carried to and from non-combat areas as a result of shrinkage of competition from foreign freighters because of war conditions in Europe and as a result of improved business conditions in the United States. (Findings Nos. 7-8, App. 90-2) There was no evidence that ocean conference tariff rates charged to shippers were excessive. (Finding No. 7, App. 91)

The evidence on which plaintiff's case was founded was summarized in the following finding of the Commissioner; (App. 56-7), (italics ours):

> "21. *The fair and reasonable market value of the use of the steamer Hawaiian on bareboat basis throughout the period of defendant's requisition of her use on such basis* from July 7, 1943, to May 1, 1946, *was from $5.00 to $6.00 per deadweight ton per month.* (See Findings Nos. 11-20.) *That value* was being realized by the plaintiff immediately prior to the vessel's entry on Government service in January 1942 and *could reasonably have been realized by the plaintiff if the vessel had not been taken by defendant,* but had remained in plaintiff's possession and control.
>
> "22. *The above findings set out facts which are not materially controverted* and which are the basis of plaintiff's theory of the case. In short, it is plaintiff's theory that at the time of the requisition there was no free market and, therefore, the Court should consult the nearest free markets in point of time, in view of proof that the factors influencing such free market, that is supply and demand, prevailed throughout the period of requisition and

would have been effective had the market remained free."

Respondent's Case Below.

Summarizing the facts and contentions of respondent's case, the Commissioner found, (App. 57-8) (italics ours):

"23. The defendant's theory of the case is likewise based on facts that are largely uncontroverted. *It is a fact that after the Ship Warrants Act became effective the Maritime Commission and the War Shipping Board, by coercive measures* pursuant to such Act, by collaboration with the British and with insurance underwriters, *made it progressively impossible for American Shippers to operate without acceptance of the Government's schedule of rates,* with the consequence that such rates came to be accepted by a substantial majority of such shippers. Having arrived at this situation, the defendant says its rates were the market or prevailing rates.

"*The defendant makes no contention that such rates bore any relation to the rates existing in the nearest free market or that such free market rates would not have remained at least as high had the market remained free. In fact, the record is replete with claims by the defendant that it destroyed the free market and effected a substantial roll back of rates.* * * *

"24. The charter rates promulgated from time to time by the United States Maritime Commission and the War Shipping Administration in the course of administering the Ship Warrants Act of July 14, 1941, and the subsequent requisition programs were not market rates nor equivalent to probable fair

market rates. *They were rates promulgated in furtherance of an admitted purpose of those agencies to acquire for defendant, by coercion and other means, the use of privately owned American merchant vessels at rates of hire fixed by those agencies at levels representing drastic reductions in current market rates of charter hire, instead of being fixed at levels commensurate with the earning power which those vessels then had and continued to have for commercial purposes.* The facts concerning the administrative acts of the Commission and the War Shipping Administration are set forth more fully in Findings Nos. 25 through 35."

Respondent took no exception to the foregoing findings other than an objection to the word "coercive" in Finding 23 and to the word "coercion" in Finding No. 24.

The Opinion Below.

The Court of Claims agreed with the Commissioner that "**economic conditions of demand for and supply of shipping space,** which had materially contributed to or brought about the level of earnings realized by shipowners in 1941 from the commercial employment of large, American-flag freighters such as the *Hawaiian,* **throughout the bareboat requisition period remained favorable to a continuance of the potential level of earnings of such freighters from commercial employment at or above 1941 levels.**" (Finding No. 17, App. 99, emphasis ours.)

Notwithstanding that finding, however, the Court held that it would be "unrealistic" to disregard the "**lawful legislative and administrative restrictions on the use of**

the property valued'' and other assumed ''war conditions''* which, in the Court's opinion, made ''what the boat earned before the war • • • no measure of what she could have earned during the war.'' (Opinion, App. 83.)

Although the Court did not attempt to specify quantitatively the reduction of ship earnings which it attributed to ''legislative and administrative restrictions'' as distinguished from the supposed effect of ''war conditions'', the great weight given to the ''restrictions'' is obvious by the Court's statement that ''except for the restrictions'' petitioner could ''no doubt'' have earned amounts ''considerly in excess'' of the amount allowed by the Court (App. 85-6).

After thus rejecting petitioner's contentions, the Court held respondent's position also to be ''untenable''. The War Shipping Administration's bareboat requisition rates of $1.25 per deadweight ton per month, plus an allowance for speed, were found to be unjustly low for the *Hawaiian*, as compared with the pre-requisition earnings which petitioner had realized. (Opinion, App. 84-5.)

Then, after stating that the Court was ''taking everything into consideration'', including ''earnings before requisition on a time charter basis and **afterwards**, • • •

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* Petitioner denies that any ''war conditions'' other than the so-called ''legislative and administrative restrictions'' would have decreased the *Hawaiian's* earning power during the requisition period and considers the Court's finding to be contrary to the evidence. No such finding appeared in the Commissioner's Report. If certiorari is granted, petitioner will urge that the Court erred in making such a finding. However, the questions presented by this petition arise from the Court's finding that the major cause of decrease would have been ''legislative and administrative restrictions.''

legislative and administrative restrictions and the uncertainties of the war, [the Court] * * * concluded that $2.50 per deadweight ton per month is 'just' both to the owner and the Government." (Opinion, App. 86)

The Court's award of $2.50 per deadweight ton per month approximated the figure of $2.46 which the Court had found, just previously in the opinion, to be the difference between: (a) petitioner's costs of $1.89 per deadweight ton per month incurred in operating vessels on a time charter basis; and (b) the requisition rate of time charter hire of $4.35 per deadweight ton per month allowed by the War Shipping Administration for the *Hawaiian* while she was under requisition on "time charter basis" preceding the requisition on "bareboat basis".

Therefore, the compensation of $2.50 per deadweight ton per month allowed by the Court in effect adopted the earnings available under the requisition time charter rates as measuring just compensation during the bareboat requisition period of the *Hawaiian*.

Those requisition time charter rates, however, were admittedly fixed by the War Shipping Administration at arbitrary levels in furtherance of a program to "roll-back" shipping rates so as to requisition vessels at levels far below probable fair market rates. (See evidence quoted in Part III of the Appendix, pp. 125-134).

The injustice of that requisition time charter level of rates moreover appears from the opinion itself because, as the Court found, those rates were the result of the War Shipping Administration having "beat the owners down as much as they could" and having threatened requisition of title to the vessels (App. 85).

The Nature and Purpose of the "Legislative and Administrative Restrictions" on which the Opinion Below Depends.

The extent, purpose and confiscatory nature of the reduced charter rate levels imposed by the "legislative and administrative restrictions" and carried over into the requisition rate schedules of the War Shipping Administration are indicated in Findings 25-35 of the Commissioner (App. 58-78) and in Findings 18-30 of the Court. (App. 100-116)

Among the important facts about the "legislative and administrative restrictions" were the following:

Until after the Ship Warrants Act became effective, the market time charter rates approved by the United States Maritime Commission were $7.50 per deadweight ton per month for large freighters and would produce "bareboat" earnings of about $5.61 per deadweight ton per month (Finding No. 16, App. 98-9). (*Rank*, tr. 733; *Houlihan*, tr. 861-3; Def. Ex. 4 at p. 170; Pl. Ex. 41 at p. 2).

The Ship Warrants Act became law on July 14, 1941. In substance, the Act (App., pp. 121-4) authorized a licensing system to be administered to effectuate the policy prescribed in Sec. 4 of the Act, which was "to make fair and reasonable provision for priorities" with respect to the transportation of strategic and other defense materials. Its terms are more fully discussed at pp. 30-32 below.

The Maritime Commission used the Act, however, as a basis for issuing two "drastically" reduced rate schedules which the Commission attempted to impose on shipping generally.

On July 30, 1941, the Maritime Commission published its first schedule of maximum time charter rates effective August 1, 1941, and soon thereafter adopted such schedule as a condition to be observed in order to obtain and hold "ship warrants" (Findings 21 (a) and (b), App. 102). The rate prescribed for a vessel of the *Hawaiian's* size was $4.60 per deadweight ton per month.

A Commission official admitted that the schedule **"represented an arbitrary reduction of $3.00 per ton under what had been more or less considered a going rate prior to that time"** (Def's. Ex. 4 at p. 171; Pl. Ex. 41 at p. 2).

On January 5, 1942, the Commission issued a second schedule of maximum time charter rates to be observed by warrant-holders beginning January 20, 1942. The new schedule reduced the levels of the previous schedule by about 28% (Finding 21 (c)). The maximum rate for a vessel like the *Hawaiian* was $3.35 per deadweight ton per month (App. 102-3).

To enforce the schedules*, measures wholly unauthorized by the Ship Warrants Act were adopted. Beginning in February, 1942, marine underwriters were induced to refuse insurance to vessels not having warrants (Finding 21(e), App. 103). By regulation, in February 1943, shore facilities were *forbidden* to furnish services or supplies to vessels not holding warrants (Finding 21(f); App. 103).

On May 14, 1942, a schedule of requisition rates on time charter basis was issued by the War Shipping Administration by its General Order No. 8 (Finding 23).

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* As warrants were unnecessary for vessels under requisition or charter to the government, American shipowners were not in fact affected by the warrants system after general requisition occurred in 1942.

Although, as we showed above at p. 12, the Court of Claims seems to have measured just compensation for the *Hawaiian* by the earnings available under this schedule of requisition time charter rates, the arbitrary and confiscatory nature of the schedule is manifest in the Court's own findings. (Findings 24-25, App. 104-7). The admitted purpose of the schedule was to fix rates which would only be sufficient to cover the shipowner's operating expense and a "bareboat factor", concerning which the Court of Claims found (App. 105, emphasis ours):

> "21 (a) **The 'bareboat' factor** of $1.00 per deadweight ton per month **was not based upon any approximation of the earnings realized by shipowners from commercial employment** of their vessels as shown by the voyage reports above mentioned, indicating such earnings from voyages terminating in the last quarter of 1941 or early 1942. The requisition time charter rates as contained in General Order No. 8 **had no relation to the 1941 commercial earnings or the 1941 value of the use of requisitioned vessels.** The former Director of Fiscal Affairs of the War Shipping Administration testified at a hearing in this case that 'we got together a lot of information and **we thought that the best way to fix the rate was to fix it on as low a basis as we possibly could.** * * * We know that in 1941 the ships were earning quite a lot of money, and that **the rates** that were published in General Order No. 8 **were nowhere near as high as the earnings the companies were making in 1941.**'"

Petitioner eventually accepted the requisition time charter rate for the *Hawaiian* while under requisition on that basis but under the compulsion described in the Commissioner's Finding 30 and the Court's Finding 26.

Characterizing the charter rate schedules under the Warrants Act and the requisition programs as a whole,

the Court made the following finding (App. 100-1, emphasis ours):

> "19. **The charter rates promulgated** from time to time **by the United States Maritime Commission and the War Shipping Administration** in the course of administering the Ship Warrants Act of July 14, 1941, and the subsequent requisition programs **were not market rates nor equivalent to probable fair market rates.**"

Probably the most important fact about the various schedules was that the predominant purpose of the requisitioning agencies in issuing them was to effect "a downward revision of the whole structure of rates and values before resorting to requisition" (Def's. Ex. 4 at p. 11). That purpose was frankly and repeatedly admitted by Admiral Emory S. Land, who was both Chairman of the United States Maritime Commission and Administrator, War Shipping Administration and others. Many of their statements are quoted from the record in Part III of the Appendix, pp. 125-134. See also Def's. Ex. 4 at pp. 11, 192, 214; Def's. Ex. 14 at p. 22; Pl. Ex. 75 at p. 464; Pl. Ex. 28 at p. 8.

REASONS FOR GRANTING THE WRIT AND SUPPORTING ARGUMENT.

In at least three respects, the decision of the Court of Claims is irreconcilable with fundamental principles embodied in the Fifth Amendment to the Constitution of the United States and presents questions of outstanding general importance which have not been but should be specifically decided by this Court.

Petition.

(1) The Fifth Amendment requires that compensation for private property taken for public use shall be measured by the standard of actual or probable fair market value when it is possible to do so but the decision below would sanction partial confiscation of that value by substituting a lower standard which would give effect to compulsory government price schedules intentionally fixed below fair market prices for the purpose of acquiring the affected property at lesser price levels.

(2) The concept of fairness underlying the Fifth Amendment's requirement of just compensation is necessarily inconsistent with the implied holding of the Court of Claims that by accepting "under some compulsion" a price which the requisitioning agency had admittedly fixed below the fair market price and had offered as compensation for one taking of its vessel, the petitioner was thereby bound, upon a subsequent taking, to accept a lower standard of compensation which would give effect to such government-fixed rates rather than to the standard of probable fair market value.

(3) The Fifth Amendment's provision that no person shall be deprived of property without due process of law and its requirement of just compensation cannot lawfully be circumvented by a licensing device such as the Ship Warrants Act and the court below was manifestly in error, therefore, in holding that arbitrary and confiscatory price schedules which the requisitioning agencies imposed as a condition of issuing ship warrants (licenses), constituted a valid limitation upon the standard of just compensation to which the petitioner was entitled.

The foregoing points will be amplified briefly below.

I.

It is, of course, elementary that if an actual fair market for similar vessels had existed in the United States at the time when the *Hawaiian* was requisitioned, petitioner would be entitled to the fair market value of the use of the vessel as established by actual market transactions. *Boom Co.* v. *Patterson,* 98 U. S. 403, 407; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 327; *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 80, 81; *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299; *Vogelstein* v. *United States,* 262 U. S. 337; *United States* v. *New River Collieries,* 262 U. S. 341; *Olson* v. *United States,* 292 U. S. 246, 255; *United States* v. *Miller,* 317 U. S. 369, 374; *Kimball Laundry Co.* v. *United States,* 1948, 338 U. S. 1; *United States* v. *Petty Motor Co.,* 1946, 327 U. S. 372; *United States* v. *General Motors Corp.,* 1945, 323 U. S. 373.

The reasons which caused adoption of the fair market value standard of just compensation apply with equal force in situations where actual current market transactions may be lacking at the time of the taking. The value to be ascertained under such conditions is the probable fair market value. *Brooks-Scanlon Corp.* v. *United States,* 1924, 265 U. S. 106, 124; *Standard Oil Co.* v. *Southern Pacific Co.,* 1925, 268 U. S. 146, 155. *United States* v. *Toronto etc. Nav. Co.,* 338 U. S. 396.

Rule 3 of the Rules of the Advisory Board on Just Compensation* defines probable fair market value as "the

* Full reference to the Report of the Advisory Board appears in the footnote on p. 27.

price that would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy." (Pl. Ex. 51, at p. 32.)

Only the standard of fair market value fulfills the test of being just to the property owner and to the government. Any compensation less than fair market value would fall short of the requirement that the compensation shall be "the full and perfect equivalent in money of the property taken" (*United States* v. *Miller,* 317 U. S. 369, 373), because it would obviously constitute a partial confiscation. Confiscation is repugnant to the Fifth Amendment to the Constitution and to simple justice, whether the confiscation be total or partial. *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312.

On the other hand, the standard of fair market value is just to the government because it limits compensation to the amount which the property owner could obtain for use of his property in a fair market but excludes any enhancement of price caused by the government's need for the property and its consequent activities in the market. *United States* v. *Cors,* 337 U. S. 325. There was no such enhancement of American shipping rates in 1941. *Smith-Douglass Co.* v. *United States,* 126 C. Cls. 758, 767.

Although the Court of Claims purported to acknowledge the foregoing principles, (App. 81-2), and although it expressly found that economic conditions throughout the *Hawaiian's* requisition period "remained favorable to a continuance of the [pre-requisition] level of earnings," (Finding 17, App. 99), nevertheless, as we have shown, the Court awarded compensation at $2.50 per deadweight ton per month, a figure far below such levels. This was done mainly on the ground that the *Hawaiian's* earning power,

if she had been free of requisition, would have been lower than the pre-requisition levels because of "legislative and administrative restrictions".

We have also shown that such "legislative and administrative restrictions" consisted entirely of rate schedules imposed by the requisitioning agencies in an effort to get the use of privately-owned ships for a compensation of about $1.25 per deadweight ton per month instead of $5.00 to $6.00 which their owners were realizing at rates approved by those agencies immediately before the schedules were imposed.

Thus, the major issue squarely presented to the Court below and to this Court is whether the Fifth Amendment permits compulsory price-fixing to be employed by a requisitioning agency for the purpose of reducing the compensation payable for private property taken or about to be taken, to levels far below the probable fair market value of the property.

Instead of facing that issue, however, the Court's discussion merely concluded by begging the question with the statement that "lawful legislative and administrative restrictions on the use of the property valued" must be considered as facts relevant to "any just and equitable valuation".

In thus deciding by necessary implication that the "legislative and administrative restrictions" were lawful and relevant, the Court of Claims possibly thought its conclusion was supported by *United States* v. *Commodities Trading Corp.*, 1950, 339 U. S. 121, which had previously been cited on a different point. Some of the expressions in the opinion of the Court of Claims resemble expressions appearing in the majority opinion in the *Commodities* case. In

fact, however, the *Commodities* decision affords no such support, as we show below.

The *Commodities* case and its predecessor decision, *United States* v. *John J. Felin & Co.*, 1948, 334 U. S. 624, both involve the relationship between just compensation and wartime price-fixing by the O. P. A. under the Emergency Price Control Act of 1942. (56 Stat. 23; 50 War Appendix, U. S. C., Secs. 901-926). That Act and the price schedules issued by the O. P. A. thereunder bore no resemblance in constitutionality, terms, scope and purpose of application either to the Ship Warrants Act, or to the requisitioning section of the Merchant Marine Act or to the "restrictions" on rates imposed by the requisitioning agencies in administering the latter Acts. For those and other reasons shown below, the *Felin* and *Commodities* decisions were not only inapplicable but *the Felin case expressly reserves decision on the principal question presented in the instant case.*

United States v. *John J. Felin & Co.*, 334 U. S. 624, involved just compensation for "pork cuts" requisitioned from a meat packer in March, 1943. The plaintiff was tendered and refused compensation at the O. P. A. ceiling price which had originally been fixed in March, 1942, at the market level prevailing then. The plaintiff sought and the Court of Claims allowed "replacement cost" which was claimed to exceed the ceiling price because of a subsequent rise in the market price of live hogs. Nevertheless the plaintiff and others had sold pork cuts to their customers at the O. P. A. ceiling price both before and after the requisition.

This Court reversed by 7 to 2 and directed judgment for the O. P. A. ceiling price but the reversal was based on three separate opinions differing widely in their grounds.

Mr. Justice Reed, with whom Mr. Justice Black and Mr. Justice Murphy concurred, adopted the view that (p. 643) "whenever perishable property is taken for public use under controlled-market conditions, the *constitutionally* established maximum price is the only proper standard of 'just compensation'." (Italics ours.) But the question presented in the instant case was expressly reserved in the following paragraph (p. 646):

> **"If the Government fixed prices with the predominant purpose of acquiring property affected by its order, a different situation would be presented. Here we have price regulation of meat products on a national scale with judicial review of those regulations. The Government sought for itself no unique opportunity to purchase."**

Mr. Justice Frankfurter, with whom Chief Justice Vinson and Mr. Justice Burton concurred, considered that the plaintiff had not carried the burden of establishing that "the pecuniary equivalent of the property taken" was more than the O. P. A. price.

Mr. Justice Rutledge, in a separate concurring opinion, likewise considered it unnecessary to decide more than that the plaintiff had not sustained the burden of proving that he was entitled to more than the ceiling price.

A dissenting opinion, concurred in by Mr. Justice Douglas, was filed by Mr. Justice Jackson.

The relationship between just compensation and O. P. A. ceiling prices was again considered by this Court in *United States* v. *Commodities Trading Corp.*, 1950, 339 U. S. 121, which arose in 1944 out of a requisition of whole pepper. The pepper was being withheld from the market for an eventual price increase expectable in accordance with a

cyclical price pattern peculiar to the pepper market. The Court of Claims allowed the owner "retention value" at 15¢ per pound instead of the O. P. A. ceiling price of 6.63¢ per pound. *The latter price "approximated the market price at the time the free market in pepper came to an end"* in December, 1941. In a 5 to 2 decision (the Chief Justice and Mr. Justice Douglas taking no part), this Court reversed and directed the Court of Claims to enter judgment based on the maximum ceiling price.

The majority opinion, written by Mr. Justice Black, rejected "retention value" as being too speculative and discriminatory. It adopted the O. P. A. ceiling price as "fair" to the owner and the government (pp. 124-5) because the statute required that the O. P. A. ceiling prices be "generally fair and equitable", because the statute provided for judicial review, because the ceiling prices were the actual market prices and because the government "should be able to buy goods fulfilling their wartime needs at the prices fixed for *other* purchasers" (pp. 124-5, emphasis ours). The majority further recognized that *"there must be room for special exceptions to such a general rule"* (p. 128). It held, however, that there was no showing of "any unfair and disproportionate burden" upon the plaintiff (p. 129).

Separate dissenting opinions were written by Mr. Justice Frankfurter and by Mr. Justice Jackson.

The lack of any resemblance between the questions presented in the *Felin* and *Commodities* cases and the situation in the instant case is apparent from the following brief summary:

(1) One outstanding difference is that the O. P. A. ceiling prices were primarily established to fix "fair and

equitable prices" in sales transactions between private parties generally as a safeguard to the national economy whereas the predominant purpose of the rate "restrictions" here involved was to enable the government agencies to acquire the use of privately-owned vessels at price levels fixed by those agencies below current fair market prices.

(2) The O. P. A. price ceilings merely "froze" the actual market prices existing when the ceilings were imposed. The price schedules here in question were admittedly arbitrary reductions to levels ultimately more than 50% below the fair market rates approved by the requisitioning agency immediately before issuing its first schedule.

(3) Unlike the Emergency Price Control Act of 1924 (cited above), the Ship Warrants Act (cited above) contained no authorization for general administrative price fixing. On the contrary, the stated purpose of the Warrants Act was to obtain priority for water transportation of defense materials at the request of the defense agencies. Further discussion of this point appears at pp. 30-32 of this petition.

(4) Even if authority for general price fixing could be read into the Ship Warrants Act, the price schedules of the Maritime Commission would be unconstitutional and void because they were prepared and issued without any compliance whatever with the requirements of "due process of law". Amplification of this point appears at pp. 32-3 of this petition.

(5) No provision whatever was made for judicial review of rate schedules issued under the Ship Warrants Act.

In effect, this case is the converse of *United States* v. *Cors*, 337 U. S. 325. In that case the Court of Claims had allowed full actual market value as just compensation for a tugboat requisitioned in 1942. That Court had also found that some unstated part of that price represented enhancement caused by prior requisitions.* This Court reversed with directions that such enhancement should be excluded because it would be unfair to require the government to pay any portion of the market price "which its demand alone has created" (p. 333).

Of necessity, the concept of "fairness" expressed in the *Cors* decision requires that the compensation also be fair to the property-owner and this Court so held in the *Commodities* case (339 U. S. 121 at 123).

If, in the *Cors* case, it was unfair to the government to increase compensation by including enhancement of market price caused by the government's needs and activities in the market for the property, then it seems beyond doubt that it would be unfair to the property-owner *to reduce compensation below fair market levels* because of price restrictions on the property deliberately imposed by the government to bring about such reduction.

Therefore, this case presents a constitutional question of outstanding general importance which has not been but should be decided by this Court.

II.

The second major question presented by this petition arises from the effect which the Court of Claims gave to petitioner's acceptance of the requisition *time charter* rate

* On rehearing, the Court of Claims held that its previous finding had been erroneous and that the enhancement, if any, was "negligible". *Cors* v. *United States*, 119 C. Cls. 296.

offered by the War Shipping Administration as compensation for the use of the *Hawaiian* under her requisition in 1942 on "time charter basis". That requisition terminated upon the government's taking full possession of the *Hawaiian* in July, 1943, under a requisition on "bareboat basis" from which this suit arose.

The coercive circumstances under which petitioner's acceptance occurred are described in the Commissioner's Finding No. 30 (App. 68-70), and in the Court's Findings 25 and 26 (App. 106-8), and are also briefly mentioned in the opinion (App. 85). The Court said (italics ours): "the War Shipping Administration had fixed a rate for time charters * * * which had been agreed to by the owners, including plaintiff, *reluctantly, it is true, and after threat of requisition of title by the War Shipping Administration,* but nevertheless agreed to. Applied to the *Hawaiian* this would have amounted to $4.35 * * *. [After deducting operating cost of $1.89 per deadweight ton per month] * * * this leaves $2.46. Plaintiff accepted this, *although under some compulsion. It cannot be denied, however, that the War Shipping Administration 'beat the owners down' as much as they could in establishing a rate of hire.*"

Plainly, therefore, by approximating that $2.46 figure when it fixed compensation at $2.50, the Court of Claims gave to petitioner's acceptance of the requisition time charter rate a substantially conclusive, though indirect, effect as the measure of just compensation under the bareboat requisition. This was done notwithstanding the coercion under which the time charter rate was accepted and notwithstanding the arbitrary nature and low level of the requisition time charter rate schedules as one of the

series of arbitrarily reduced schedules issued by the requisitioning agencies.

The irreconcilability of that holding with the basic requirement of "fairness" in determining just compensation (*United States* v. *Cors*, 337 U. S. 325 at 332-4 and *United States* v. *Commodities Trading Corp.*, 339 U. S. 121 at 123) is too obvious to need elaboration.

The holding is equally irreconcilable with the established standard of probable fair market value as the practical measure of just compensation. That standard rendered the contract which arose from petitioner's acceptance of the time charter rate plainly irrelevant because it could not possibly fulfill the basic test of being a transaction resulting "from *fair* negotiations between an owner willing to sell and a purchaser desiring to buy." *Brooks-Scanlon Corp.* v. *United States*, 1924, 265 U. S. 106, 124; *Standard Oil Co.* v. *Southern Pacific Co.*, 1925, 268 U. S. 146, 155. See also Rule 3 in the Report of President's Advisory Board on Just Compensation*, December 7, 1943.

Indeed, even if evidence of actual coercion had been lacking, the contract would still have been irrelevant because the mere fact that a transaction is with an agency having the power of eminent domain has generally been held to be sufficient ground for disregarding it in the determination of fair market value. The possibilities are too great that such transactions are not freely arrived at between willing sellers and willing buyers under fair

* The Report of the Advisory Board (which was appointed on October 15, 1943 by Executive Order 9387, 8 Fed. Reg. 14105) was not officially reported. It is unofficially reported in 1943 A. M. C. 1443 and appears at pp. 31-33 of Plaintiff's Exhibit 51 in this case. The Report was mentioned with approval in *United States* v. *Cors*, 337 U. S. 325 at 330, 334-5, and in *United States* v. *Toronto etc. Nav. Co.*, 1949, 338 U. S. 396, 403, 405.

market conditions. *Orgel, Valuation under Eminent Domain,* Sec. 146, 489-494; *Lewis on Eminent Domain* (3d Ed.), Vol. II, Sec. 667, p. 1147; *Nichols on Eminent Domain,* 2d Ed., Sec. 456; *United States* v. *Foster,* 1942, C. C. A. 8, 131 F. (2d) 3, 5; *United States* v. *Reynolds,* 1940, C. C. A. 5, 115 F. (2d) 294, 296; *United States* v. *Bailey,* 1940, C. C. A. 5, 115 F. (2d) 433, 434; *Five Tracts of Land* v. *United States,* 1900, C. C. A. 3, 101 Fed. 661.

Earlier, the Court of Claims itself had declined to give effect to much less drastically low requisition rates of the old Shipping Board notwithstanding acceptance by "a very large percentage" of shipowners. *Gulf Refining Co.* v. *United States,* 58 C. Cls.

From the standpoint of constitutional law, the holding of the Court below is shocking because the safeguard of the Fifth Amendment would vanish if the rates of compensation arbitrarily established by requisitioning agencies should automatically become the measure of just compensation merely by showing that some property-owners had accepted the rates in other transactions, especially if such acceptances were under compulsion.

III.

The third major question presented arises from the great weight given by the Court of Claims to the charter rate schedules issued by the requisitioning agencies in the course of administering the Ship Warrants Act and requisition programs. Those schedules were treated as "lawful legislative and administrative restrictions" relevant to determination of just compensation (Opinion, App. 83).

In the first point of argument, it has been shown that the schedules were invalid "restrictions" because of the

confiscatory purpose intended to be accomplished by their enforcement. Even if that purpose had not existed, however, those schedules could not constitutionally be given effect as general price-fixing regulations affecting just compensation either for American freighters as a class or for the *Hawaiian* in particular.

To give those schedules any effect would be inconsistent with the guarantees of the Fifth Amendment. That is so because: 1. The statutes involved did not authorize general price fixing; 2. The schedules would be void in any event as general price regulations because they were not issued in compliance with the requirements of due process of law; 3. The schedules under the Warrants Act were never legally effective as to petitioner because petitioner never gave an undertaking to observe the schedules; and 4. The licensing feature of the Warrants Act could not give constitutional validity to the otherwise invalid schedules.

1. Although one or the other of two statutes, the Ship Warrants Act (App. 121-4) and the Merchant Marine Act, 1936, (App. 119-121) was claimed to authorize each of the four successive schedules of rates constituting the "legislative and administrative restrictions", (See pp. 13-16, *supra*) it is clear that no general price-fixing authority could be derived from the requisitioning section (Section 902) of the Merchant Marine Act. That section (App. 119-121) only authorizes the ship requisitioning agency to offer the owner of the requisitioned ship such amount as, in the agency's judgment, will be just compensation. The statute specifically preserves the right of the property-owner to reject such rate, to accept 75% of the amount

offered and to sue "for such further sum as, added to said 75 per centum, will make up such amount as will be just compensation" (Section 902b).

Manifestly the Merchant Marine Act did not attach even presumptive weight requisition rates offered by the requisitioning agency and the Court of Claims so held in its opinion. (App. 84) Consequently, the two requisition rate schedules issued in May, 1942 and in April, 1944, respectively, had no statutory authority as general price-fixing regulations.

Therefore, only the Ship Warrants Act will be discussed further.

The Ship Warrants Act is printed in full in the Appendix (App. pp. 121-4), but its legislative history, so far as rate regulation is concerned, and its principal provisions are summarized in the Commissioner's Finding No. 25 (App. 58-60).

Congress never intended the Act to be price legislation. The understanding of the House was expressed by the committee report on the bill as follows (House Report No. 526, May 12, 1941, U. S. Code Congressional Service, 77th Congress, 1st Session, 1941 Volume, p. 658, West Pub. Co.):

> **"The legislation does not contemplate governmental prescription of rates now agreed to by conferences, but would accord a measure of control over shipping by means of a commercial bargain with vessel owners and charterers."**

The probable understanding of the Senate is obvious from the following written representation submitted by the Maritime Commission at the conclusion of the Senate Committee hearings, (Pl. Ex. 214 at p. 46):

***Conclusion.*—The bill is designed and will be administered only as priorities legislation, a regulatory plan for which there is ample legislative precedent and which will meet a vital need of our defense and our domestic economy.**

The bill does not authorize nor will it be administered as a direct or indirect means of taking property or putting it to a public use without just compensation.

Even without that legislative history, the terms of the Act itself (Section 4) clearly restrict its function to effecting priorities in the transportation of defense materials. American freighters were then already operating at capacity in the carriage of commercial cargoes (Finding No. 7, App. 90).

The machinery for effecting such priorities consisted of a scheme for licenses (called "warrants") (Sec. 1), entitling vessels to *priority* in procurement of fuel and other necessaries in United States ports (Section 3). In return for the warrant, the ship-operator receiving it was required to give an undertaking to comply with the orders of the Maritime Commission regarding the employment of his vessel, the cargoes to be carried and the "fair and reasonable maximum rate of charter hire or equivalent" to be charged by the ship-operator (Section 2).

The foregoing statement of the scheme and tenor of the Act are sufficient to demonstrate that no Congressional authorization for price-fixing regulations of general application to merchant ships can fairly be drawn from the provisions of the Ship Warrants Act.

While it is true that Congress authorized the Maritime Commission to require warrant-holders to observe a "fair and reasonable maximum rate", such authorization was

clearly limited in purpose and merely incidental to the stated purpose of the Act to obtain priority for defense transportation.

Such rate schedules were necessary to avoid delays and overcharges in the enforcement of priorities for the carriage of defense materials by warrant-holding vessels. In the absence of such schedules the Commission would merely be entitled to specify the transportation to be performed by a given vessel on a given voyage, but the charges would have to be the subject of bargaining and delay.

2. Even if there had been statutory authorization for the general fixing of shipping rates, however, the actual rate schedules issued would have no general validity under any constitutional price-fixing statute for two reasons:

(a) Throughout their administration of the Ship Warrants Act, the Commission and the War Shipping Administration disregarded even the rudiments of "due process of law". (See Commissioner's Findings Nos. 26 (a) and 26(c), App. 60-62). In regulation by an administrative agency, the minimum requirements of "due process" are: (i) that reasonable notice of the proposed regulation be given to the parties to be affected; (ii) that there be a fair and open hearing at which such parties have an opportunity to present evidence and argument in opposition; (iii) that the agency action shall be authorized by law, based on findings supported by substantial evidence adduced at the hearing and shall not be arbitrary and capricious. *Morgan* v. *United States,* 1937, 304 U. S. 1, 14; *Yakus* v. *United States,* 1944, 321 U. S. 414; *Wong* v. *McGrath,* 1950, 339 U. S. 33.

Even if wartime conditions could extenuate the lack of notice and hearings regarding the schedules, they would

unquestionably have been invalid as agency regulations affecting private shipping generally because the schedules were wholly unsupported by any findings or substantial evidence and were both arbitrary and capricious.

Indeed, it is hard to imagine what evidence could have been adduced to support the necessary findings. It would have involved a self-contradiction to find that, at a time when shipping was in great demand, it was "fair and reasonable" arbitrarily to reduce fair and approved current market rates for the use of ships by more than a third at first and, ultimately, by more than half. Moreover, it is impossible to see how such action could reasonably be found to be in furtherance of the stated purpose of the Ship Warrants Act to obtain priorities for defense transportation.

(b) In the second place, the rate schedules were confiscatory because arbitrarily fixed at levels more than 50% below current fair and reasonable market rates. If given compulsory force, such rates would constitute confiscation of half the earning capacity of any vessel affected and would be quite as indefensible as a regulation purporting to require half the physical carrying capacity of the vessel to be placed at the disposal of the government free of charge. No constitutional statute can authorize confiscation.

Moreover the schedules violated Section 2 of the Warrants Act itself which only authorized imposition of a "fair and reasonable maximum rate of charter hire" as a condition of issuing ship warrants.

3. In any event, the rate schedules were never effective as to petitioner because it declined to give the undertaking necessary to obtain a warrant (Finding No. 20, App. 101).

4. The final and perhaps the most important constitutional objection to the rate schedules as affecting just compensation lies in the fact that the requisitioning agencies appear to have assumed that they were entitled to dispense with the requirement of due process of law because the Warrants Act was in the form of a licensing scheme. On its face, the scheme appeared to give a ship-operator freedom of choice whether or not to give an undertaking to observe the regulations imposed as a condition of obtaining the supposed advantages in respect of procurement of supplies. But, in fact, the Act was administered by the requisitioning agencies so as to make it "progressively impossible * * * for American shippers to operate without acceptance of the government's rates" (Finding No. 18, App. 100).

In other factual settings, this Court has been vigilant in preventing the use of the licensing device to circumvent the Constitutional requirement of "due process of law". (*Frost Trucking Co.* v. *Railway Commission,* 271 U. S. 583 at 593; *U. S.* v. *Butler,* 1936, 297 U. S. 1, at p. 70.)

This case presents the question whether the licensing device can be used to avoid the requirements of the just compensation clause of the Fifth Amendment.

The magnitude of the question is obvious. As this Court said in *United States ex rel. T. V. A.* v. *Powelson,* 1943, 319 U. S. 266, at 284:

> "The United States no more than a state can be excused from paying just compensation measured by the value of the property at the time of the taking merely because it could destroy that value by appropriate legislation or regulation."

CONCLUSION.

Petitioner respectfully urges that the writ of certiorari requested by this petition be granted.

July 29, 1955.

Respectfully submitted,

CLEMENT C. RINEHART,
Counsel for Petitioner.

KIRLIN, CAMPBELL & KEATING,
Attorneys for Petitioner.
120 Broadway,
New York 5, N. Y.

APPENDIX TO THE PETITION.

PART I.

COMMISSIONER'S REPORT, OPINION, FINDINGS, JUDGMENT AND MOTION FOR REHEARING IN THE UNITED STATES COURT OF CLAIMS.

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REPORT OF COMMISSIONER.

(Filed June 30, 1953.)

To the Honorable the CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

Pursuant to the order of reference in the above-entitled case the undersigned commissioner herewith makes the following report of his findings of fact:

1. At all times relevant to this case, the American steamship *Hawaiian* was wholly owned by the plaintiff, American-Hawaiian Steamship Company, a New Jersey corporation, organized in 1899. On July 7, 1943, at 6:50 p. m., the defendant, acting through the War Shipping Administration, took the possession and use of the *Hawaiian* at Baltimore, Maryland, on "bareboat basis." The taking was by requisition under authority of Section 902 (a) of the Merchant Marine Act, 1936, as amended. Possession and use of the vessel by the War Shipping Administration under such requisition continued until she was redelivered to the plaintiff at Richmond, California, on May 1, 1946, at 12:00 midnight.

2. By letter dated July 31, 1944, the War Shipping Administration tendered plaintiff a demise or "bareboat" form of charter party describing the *Hawaiian* as having 9,460 tons deadweight capacity and setting forth proposed terms of the use of the *Hawaiian* during the bareboat requisition period, including an offer of hire at the rate of $12,108.80 per calendar month. The terms of the charter tendered were those prescribed by War Shipping Administration General Order No. 13, Supplement 1, issued April 7, 1944. The hire offered was specified in War Shipping Administration General Order No. 37, also issued April

7, 1944, "to establish * * * rates of charter hire for self-propelled ocean-going iron and steel vessels * * * requisitioned for use pursuant to the provisions of Section 902 of the Merchant Marine Act, 1936, as amended * * *." Under General Order No. 37, the rate of bareboat hire for dry cargo vessels built during the period 1914-1934 was $1.25 per deadweight ton per month, with certain additional allowances for vessels having speeds equal to or in excess of 11 knots. The hire tendered for the *Hawaiian* was at the rate of $1.28 per deadweight ton per month, being the sum of $1.25 and an additional $0.03 provided for vessels having speeds equal to or exceeding 11 knots but less than 12 knots. As the *Hawaiian's* speed exceeded 12 knots (see finding No. 4), she was entitled under General Order No. 37 to $0.06 instead of $0.03 in addition to the basic $1.25 per deadweight ton per month.

3. On August 24, 1944, plaintiff wrote the War Shipping Administration declining to accept either the form of charter or the rate of hire offered. As required by Section 902 (d) of the Merchant Marine Act, 1936, as amended, defendant made, between March 24, 1944, and August 16, 1946, monthly payments to plaintiff aggregating $307,079.74, on account of just compensation for the use of the *Hawaiian*. The aggregate amount of such payments on account was equivalent to hire at the monthly rate of $9,081.60 or 96¢ per deadweight ton for the bareboat requisition period of 33 months, 25 days, 5 hours and 10 minutes and was also equivalent to 75% of hire at the rate of $1.28 per deadweight ton per month, tendered by defendant on July 31, 1944.

Thereafter, plaintiff brought this suit to recover, as just compensation for the use of the *Hawaiian*, hire at the rate of $6.00 per deadweight ton per month, less the hire which the defendant has already paid on account at the rate of 96¢, the net compensation claimed being equivalent to $5.04

per deadweight ton per month. In addition, plaintiff also claims compensation for defendant's delays in payment. The *Hawaiian's* net earnings had been at the rate of $6.16 per deadweight ton per month (before depreciation and taxes), on her last voyage before she entered defendant's service under a time charter to the United States Maritime Commission on January 9, 1942.

Settlement has been made of the claims of plaintiff and defendant, respectively, for consumable stores and fuel aboard the vessel when the requisition period began and ended and also of plaintiff's claims for reconditioning of the vessel on her release from requisition. Plaintiff has not made any assignment or transfer of its claim for just compensation for defendant's use of the *Hawaiian* under bareboat requisition or of any part thereof or interest therein.

4. At all times material to this suit, the *Hawaiian* was a steel, ocean-going, single-screw, steam freighter built in 1919, documented under the laws of the United States, and was classed A1 by the American Bureau of Shipping.

Her deadweight carrying capacity was 9,460 tons and her bale cubic capacity was 413,495 cubic feet. She was designed to carry all types of goods, except liquids in bulk and refrigerated cargo, but was especially well suited for the carriage and handling of general cargo by reason of having three complete decks, an extra (orlop) deck in No. 1 hold, 5 cargo hatches, and 7 sets of cargo gear.

The vessel's propelling machinery consisted of quadruple-expansion, reciprocating engines of 3,400 indicated horsepower and four oil-burning, scotch-type boilers, giving her a speed in excess of 12 knots. By reason of her bunker capacity of 16,306 barrels and daily consumption of 206 barrels, the *Hawaiian* had a cruising radius of 23,420 miles.

The register dimensions of the vessel were: length, 404.6 feet; breadth, 53.9 feet; depth, 26.2 feet. Her draft on

summer load line was 28′ 5¼″ and her corresponding gross register tonnage was 6,264 tons.

Her equipment included a heavy lift boom, special lockers for valuable cargo, radio direction finder, electric sounding machine and spare parts in excess of those required by the American Bureau of Shipping.

The crew complement, including master, was 39.

5. Surveyors and inspectors representing both plaintiff and defendant examined the *Hawaiian*, both in drydock and afloat, at or about the time of her taking in July, 1943, and found her to be in good condition.

Her good condition and dependability were further shown by the following table showing the favorable comparison between her performance throughout her government service and the average performance of newly built Liberty vessels operated by plaintiff as agent for the War Shipping Administration:

	Hawaiian	Five Liberties	
		Total	Average
Operating period	1,371 days	6,233 days	1,246 days
Steaming time	672 days	2,809 days	562 days.
Average speed	10.4 knots		9.5 knots.
Repairs at sea	6 hours 1 d	16 h. 42 m	8.1 hours.

6. Neither at the time of her taking nor at any subsequent time during the bareboat requisition period of the *Hawaiian* was there a free market in the United States for the use of large, ocean-going, American-flag freighters because on April 18, 1942, the use of all such privately-owned vessels had been requisitioned on "time charter basis" by the War Shipping Administration. The War Shipping Administration continued to retain possession and use of substantially all such freighters from April 1942, until after March 2, 1946.

The period of Government use of a number of such freighters began even prior to the general requisitioning in April 1942. The United States Maritime Commission and

its successor agency, the War Shipping Administration, had acquired the use of many such freighters by chartering them directly at various times after June 2, 1941. Those agencies had also controlled the employment of various other freighters by directions given in the course of administering the Ship Warrants Act of July 14, 1941 (55 Stat. 591). In such cases, the agencies prescribed the rates of charter hire at levels generally below current market rates. (See Finding No. 26.)

7. Notwithstanding the absence of any commercial market from the general requisitioning in April 1942 to the end of requisitioning in the first half of 1946, the value of the use of large, American-flag freighters like the *Hawaiian* throughout such period may be ascertained from the evidence on five points:

(a) The worldwide conditions which contributed to an increase in the commercial earning power of such freighters between the outbreak of war in Europe in September 1939 and the first use of freighters by our Government in 1941 (see Finding No. 8);

(b) The level of commercial earning power which, as a result of such conditions, such freighters had already attained from employment by their owners for their own account at and prior to the time when defendant took their use in April 1942 (see Findings Nos. 9-17);

(c) The continuance throughout the requisition period of the same conditions which had brought about the level of earnings existing in April 1942 (see Finding No. 18);

(d) Defendant's actual earnings at substantially the same level realized during the requisition period when defendant employed freighters for nonmilitary use (see Finding No. 19); and

(e) The continuance of a comparable level of earnings in 1946 after defendant returned such freighters to their owners (see Finding No. 20).

In determining the amount of hire constituting just compensation during such period, it is further necessary to determine and deduct the amount, if any, of the enhancement included in such value due to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type or to a prospective taking reasonably probable.

8. Worldwide changes in conditions affecting the profitability of commercial merchant shipping occurred as a result of the outbreak of war in Europe in September 1939.

Prior to the war, there had been an oversupply of shipping throughout the world and particularly in the United States. Afterwards, a worldwide shortage of vessels available for trade developed and, by the end of 1940, shipping space was hard to get. For the first time in years, capacity cargoes were available both outward and homeward.

Under such conditions, economic factors, applicable alike to water and rail carriers, caused earnings of carriers to increase in much higher proportion than the mere rate of increase in traffic, one principal cause being the fact that the costs of carriage do not increase proportionately to increases in the quantity of cargo carried per vessel or train or in the length of the haul. It follows also that an increased rate of earnings does not imply an increase in the level of tariff rates charged to shippers.

As a result of the foregoing conditions, the commercial earning power of large, American freighters rose sharply during the period 1939-41.

There is no evidence that the ocean tariff rates charged to shippers at the levels fixed by conference carriers at any time exceeded rates justifiable under the conditions.

None of the increased carryings of American-flag freighters during the two years following November 4, 1939, included munitions of war or other traffic to or from the combat zones in Europe because the Neutrality Act of

November 4, 1939 (54 Stat. 4), excluded our merchant vessels from those zones.

Among the principal underlying causes for the increase in carryings and earning power of American freighters, aside from the Government's need for shipping, were the following:

(a) The decrease in the effective world supply of freighters available for commercial employment as a result of such war conditions as sinkings, immobilization by blockade, delays by war damage, delays by convoy operations in combat zones, and diversion by belligerents of their own merchant vessels to military use or to use in combat areas from which our shipping was excluded by the Neutrality Act;

(b) The increase in volume of traffic available to American-flag freighters in foreign trade by the decline in competition from foreign-flag freighters on routes outside the combat zones;

(c) The increased proportion of traffic producing higher freight revenues resulting from increased exports of manufactured goods from the United States after Europe was cut off as a source of supply to other world areas;

(d) The general improvement in business conditions in the United States.

9. The earnings of freighters are derived from two principal kinds of operations: (a) charter operation; and (b) berth operation. In addition, some vessels are operated by industrial carriers serving primarily their parent companies.

(a) In a charter operation, a single charterer contracts with the shipowner for the entire carrying capacity of the vessel in consideration of which the charterer agrees to pay the shipowner either a monthly rate of charter hire, as in the cases of bareboat charters and time charters, or an

agreed freight per voyage, as in the case of voyage or "trip" charters. Voyage charter freight may be fixed at a stated rate per ton or other unit of cargo (a rate charter), at a stated rate per unit of the vessel's cargo space (a space charter), or at a lump sum (lump sum charter).

Under the usual bareboat charter, the charterer has full possession and operation of the vessel and pays all expenses, including upkeep.

Under the usual time charter, the shipowner retains possession and operation of the vessel and pays for her supplies, crew, repair and ordinary insurance, but the charterer pays for fuel, cargo and port expenses and also for war risk insurance on the vessel.

Under a voyage charter, the shipowner operates the vessel at his expense. The cargo and port expenses and cost of war risk insurance may be borne either by the shipowner or charterer or partially by each, depending on the terms of the charter. Under a "net form" voyage charter, the charterer or cargo owner pays the expenses incident to the loading and discharge whereas under a "gross form," the ship pays such expenses.

If a charterer is a common carrier or if he subcharters to others, his profit is the difference between (a) the charterer's revenue from freights which he obtains from the actual shippers of cargo or from the subcharterer, and (b) the charterer's expenses which include charter hire or freight and such vessel, voyage, cargo or other expense as the terms of the charter may place on the charterer.

(b) In berth operation, the shipowner is a common carrier transporting goods for the general public at freight rates fixed in conference or other tariffs and paying all the expense of the operation. The entire earning power of the vessel is realized by the shipowner in berth operations, instead of being divided between the owner and the charterer as in charter operations.

10. The earnings of plaintiff's fleet of 32 freighters in 1941 and in 1942, up to the time of their requisitioning by defendant on time charter basis, were derived from operations both in the domestic and foreign trades. In the domestic intercoastal trade plaintiff maintained a berth operation. In the foreign trade plaintiff engaged in both charter operations and berth operations with 20 of its vessels.

Plaintiff's charter operations in foreign trade in 1941 and 1942 (other than those under certain time charters to the United States Maritime Commission, see Finding No. 24 (g)), were of two kinds: (a) under 10 commercial time charters made to other private operators; and (b) under 10 space charters to the British Ministry of War Transport for voyages outward from the United States to ports in the Red Sea.

Plaintiff's berth operations in foreign trade consisted of: (a) return voyages to the United States after conclusion of the space charters to the Red Sea; and (b) round voyages between the United States and ports in South Africa.

11. The average earnings realized by plaintiff from all voyages which commenced in 1941 and terminated in 1941 or 1942 by all plaintiff's vessels operating in foreign trade (except from voyages under charters to the Maritime Commission), were as follows:

Plaintiff's average 1941-42 earnings in foreign trade

[From Plaintiff's Exhibit 25]

	Deadweight, ton months	Profit
1. Time charters (11 voyages)	650,796.57	$3,144,473.61
2. Space charters outward and berth voyages homeward (10 voyages)	547,128.69	3,106,878.53
3. Berth voyages to South Africa (3 voyages)	132,762.67	573,455.02
Total	1,330,687.93	6,824,807.16

Average profit per deadweight ton per month from all plaintiff's foreign trade voyages in 1941-1942

(Before overhead, depreciation and taxes)

$$\frac{\$6,824,807.16}{1,330,687.93}=\$5.13$$

The profits of plaintiff's 9 vessels operated on the 11 time charter voyages shown above did not represent the full earning power of the vessels on those voyages because, in order to determine a vessel's full earning power in a time charter operation, the profits of the time charterer must be added to the profits of the shipowner. (See Finding No. 9, and because four of the voyages were under time charters made in January or March 1941, at rates below the level which prevailed later in 1941). (See Pl. Exs. 25B, 25G, 25H, 25I.)

Eliminating the time charter voyages, the average profit of the 13 other voyages was as follows (from plaintiff's Exhibit 25):

	Deadweight, ton months	Profit
Space charters outward and berth voyages homeward	547,128.69	$3,106,878.53
Berth voyages to South Africa	132,762.67	573,455.02
Total	679,891.36	3,680,333.55

Average profit per deadweight ton per month from all plaintiff's foreign trade voyages (1941-42), except those under time charters:

(Before overhead, depreciation and taxes)

$$\frac{\$3,680,333.55}{679,891.36}=\$5.41$$

Earnings exceeding $6.00 per deadweight ton per month after overhead but before depreciation and taxes were actually realized by seven of defendant's vessels, including

the *Hawaiian*, on certain of the voyages included in the foregoing statement.

Plaintiff's earnings were actually higher than those stated in the above table because plaintiff's marine insurance on its vessels prior to December 24, 1941, was carried in defendant's own self-insurance fund at a rate of 3% on a valuation of about $50 per deadweight ton; whereas in computing insurance expense for periods prior to December 24, 1941, in the above statement, plaintiff took the cost of insurance at actual market rates, which were 3½% on a valuation of $100 per deadweight ton.

12. The earning power of the *Hawaiian* per deadweight ton per month was somewhat greater than the average earning power shown in Finding No. 11 for all plaintiff's vessels engaged in foreign trade in 1941-42.

13. The earnings realized by plaintiff's vessels were merely typical of the earnings being realized in foreign trade by large American freighters generally during the period immediately preceding the general requisitioning in 1942. (See Findings Nos. 14, 15, 16, and 17.)

14. Illustrative of the earnings available in foreign berth operations are the earnings of three American freighters of the Hog Island type, which States Marine Corporation bought in late 1940 or early 1941.

Before the outbreak of war in Europe in September 1939, States Marine Corporation operated entirely with chartered foreign-flag vessels. The number of charters which they made per year averaged about 300. An average of 40 time chartered vessels was used to maintain about twelve berth services from the United States to Europe, South Africa and Japan. In addition, the company engaged in numerous full cargo trades and acted as agents for others.

As a result of the scarcity of foreign-flag vessels in 1940, the company began chartering American-flag vessels and

also purchased the three Hog Island vessels in question. Until they were requisitioned on time charter basis in 1942, these three vessels were employed on 23 voyages in the company's berth service between the United States and South Africa. The first voyage began on October 30, 1940, and the last voyage terminated on May 13, 1942. The average profit of the three vessels while so operated amounted to $4.92 per deadweight ton per month (Plaintiff's Ex. 38).

Hog Island type vessels are of about 8,000 tons deadweight carrying capacity and about 10½ knots speed. If the *Hawaiian* had been employed on the same voyages, her greater speed and carrying capacity could have produced additional earnings of about 50¢ to 75¢ per deadweight ton per month, equivalent to total earnings of about $5.42 to $65.67 per deadweight ton per month.

15. The profitability of American freighters in charter or "tramp" operations in foreign trade during 1940-42 is shown by the earnings of two Hog Island vessels, the *Ann Skakel* and the *Patricia Skakel*, purchased in December 1940 and January 1941, respectively, by subsidiaries of Parry Shipping Company, Inc., of New York. Operating under various forms of charter, the vessels loaded or discharged cargoes in the United States, the Far East, India, South America, Canada and West Africa.

From the voyages of the *Ann Skakel* completed within the company's fiscal year ending October 31, 1941, her earnings were $4.22 per deadweight ton per month, although most of that time she was under a time charter dated February 19, 1941, at a hire of $5.50 per deadweight ton per month, a figure well below the current market rate of $7.50 prevailing before the Ship Warrants Act schedules of time charter hire were issued on July 30, 1941.

The first voyage of the *Patricia Skakel* consisted of a space charter from New York to Vladivostok, a voyage charter for a cargo of sugar from Java to Ceylon and a voyage charter with a cargo of ore from India to Balti-

more, occupying 176 days from the beginning of loading in New York on January 29, 1941. From that round voyage the vessel's gross revenue was $492,368.33 and her net profit, $298,546.98, equivalent to $6.36 per deadweight ton per month.

The remaining voyages of the *Patricia Skakel,* commencing in July 1941 and occupying about 384 days, included two coal voyages to South America at low rates directed by the United States Maritime Commission in connection with its administration of the Ship Warrants Act, and did not represent the best business available to the vessel. Even so, the average profit realized by her owner from the entire operation up to September 19, 1942, when defendant requisitioned title to the *Patricia Skakel,* amounted to $4.25 per deadweight ton per month.

Excluding the second fiscal year's operations of the *Ann Skakel* under time charter and those of the *Patricia Skakel* involving voyages at Warrant Act rates, the combined earnings of the two vessels were:

	Voyage days	Profit
Ann Skakel	316	$354,981.87
Patricia Skakel	176	298,546.98
Total	492	653,528.85

Deadweight ton months—

$$492 \times 8000 = \frac{3,936,000}{30} = 131,200$$

Average earnings per deadweight ton per month

(Before depreciation and taxes)

$$\frac{\$653,528.85}{131,200} = \$4.98$$

As the *Hawaiian* was about 20% faster and larger than the two Parry vessels but would operate for approximately the same cost, the *Hawaiian's* earnings would have been at a higher rate if she had performed the same business.

16. Reports submitted to the Maritime Commission by operators of large, American freighters giving the financial results of 340 voyages terminating in the last quarter of 1941 or early 1942, fully confirm the fact that immediately prior to the general requisitioning in 1942, the average earnings of such freighters generally in overseas foreign trades approximated the average earnings of plaintiff's vessels in those trades, as shown in Finding No. 11. Those voyages included 149 in foreign overseas trades by freighters built before 1935. The freighters making 103 of the voyages were privately owned and operated. The other 46 voyages were by Government-owned freighters chartered on bareboat basis to private operators.

An analysis by certified public accountants of the 103 voyages in the foreign overseas trade by privately-owned and operated freighters shows the average earnings of such freighters (before depreciation, overhead expense and taxes), to have been as follows:

Foreign overseas berth operations by privately owned and operated vessels

Schedule in Pl. Ex. 64	Voyages	Average profit per d. w. t. per mo.
A	68	$5.50

Foreign overseas time charter operations by privately owned vessels

	Schedule in Pl. Ex. 64	Voyages	Average profit per d. w. t. per mo.
Owners' profit	B	17	$4.44
Charters' profit	C	18	1.15
Total vessel earnings			5.59

Although the financial results of the 46 voyages made by Government-owned freighters under bareboat charter to private operators are not strictly comparable because of the smaller size of the vessels, their relatively higher operating expense and certain differences in trades, nevertheless they

furnish additional proof of the profitability of freighter operation in 1941-42 as the following table shows:

Foreign overseas operations of Government-owned vessels bareboat chartered to private operators

[Pl. Ex. 64, Sched. D.]

	Voyages	Average profit per d. w. t. per mo.
U. S. M. C. hire	46	$2.21
Charterers' profit	46	2.67
Total vessel earnings		4.88

The foregoing table also shows that the Maritime Commission itself was collecting bareboat hire from private operators immediately before the general requisition at a rate far in excess of the amount $1.00 per deadweight ton per month which the War Shipping Administration included in its computation of requisition time charter hire as "bareboat" compensation to owners of requisitioned freighters. The Commission's average collections of $2.21 per deadweight ton per month did not represent a commercial bareboat market rate nor were they the full compensation collected by the Commission because the Commission's bareboat charters to private operators during the period 1940-41 in many cases required the operator to pay the Commission half of the profits in addition to a basic rate of hire. The basic rates of bareboat hire charged by the Commission ranged from $1.16 per deadweight ton per month in three charters made in May 1940 to $3.00 per deadweight ton per month in four charters made in May 1941. On some voyages the Commission collected $4.93 per deadweight ton per month and the charterer also realized a profit of $2.56 on the same voyages, equivalent in the aggregate to vessel earning power of $7.49 per deadweight ton per month.

17. Numerous admissions were made by officials of the Maritime Commission or War Shipping Administration, in

public statements and elsewhere, that earnings comparable to those shown in Findings Nos. 11, 14, 15, and 16 were being realized by owners of American freighters from commercial employment as distinguished from employment by the Maritime Commission or the War Shipping Administration in connection with their administration of the Warrants Act or the requisition program.

The Maritime Commission itself admitted and approved (until after the Ship Warrants Act became law on July 14, 1941), time charter rates of $7.50 per deadweight ton per month. Such a rate would yield a "bareboat" return or equivalent of $5.79 per deadweight ton per month, after deducting the actual average vessel and voyage expenses of $1.71 per deadweight ton per month incurred by plaintiff's vessels while engaged on 11 voyages under time charters during the period from February 2, 1941, to April 17, 1942.

The average "bareboat equivalent" realizable in 1941 from the time charter rate of $7.50 per deadweight ton by large freighters of various size groups was, according to defendant's own cost studies, as follows:

Size of vessel (deadweight tons)	Time charter hire	Vessel expense	Bareboat equivalent
	Per deadweight tons per month		
10,000 and over	$7.50	$1.45	$6.05
9,000 to 9,999	7.50	1.49	6.01
8,000 to 8,999	7.50	1.73	5.77

18. Although military demands were paramount throughout the period of defendant's use of the privately owned American freighter fleet under requisition, defendant continued to employ freighters for carriage of commercial and other nonmilitary cargo at conference tariff rates of freight or, in the case of bulk cargoes, at rates established by the War Shipping Administration.

Throughout that period, the conditions of demand for and supply of shipping space for nonmilitary purposes remained favorable to a continuance of the potential commercial earning power of large, American freighters at

levels not less than those prevailing immediately prior to the general requisition in April 1942, for the following reasons:

(a) The total world supply of freighters available for all purposes, military and nonmilitary, continued to decrease, principally as a result of Axis submarine and air attacks, until the latter part of 1943 when the losses were made up by new vessels constructed as a result of the emergency.

(b) New construction did not at any time create a surplus of freighters because military and other demands for shipping always exceeded the available supply.

(c) The value of our nonmilitary exports and imports during each of the requisition years, 1942-46, far exceeded the levels of 1941.

(d) Prices and corporate incomes in the United States in the years 1942-46 increased to and remained at levels far above those prevailing in 1941.

(e) The demand for carriage of nonmilitary cargo was such that use of shipping space for such purposes was restricted by Government permits and priorities.

(f) Increases in costs of vessel operation as a result of war conditions were offset by rate surcharges.

19. Specific confirmation of the continuance of the pre-requisition level of freighter earning power during the requisition period appears from the earning of $5.21 per deadweight ton per month realized by plaintiff's steamer *Utahan* from carriage of commercial cargo on three requisition voyages to South America during the period June 7, 1943 to February 21, 1944, which, moreover, includes the first seven months of the *Hawaiian's* bareboat requisition period. Because of the *Hawaiian's* superiority over the *Utahan* in speed, the *Hawaiian* could probably have earned $5.46 per deadweight ton per month on the same voyages.

Further confirmation that the prerequisition level of earnings could have been realized by freighters during the requisition period is furnished by the fact that the owner's expense factor under time charter operation did not increase greatly from the prerequisition levels shown in Finding No. 17. According to defendant's studies, the owner's expense factor under the requisition time charters amounted to an average of $1.882 per deadweight ton per month (see table in Finding No. 33). If the pre-Warrant Act time charter rate of $7.50 per deadweight ton per month (see Finding No. 17), had also been maintained (as the level of berth rates was apparently maintained according to the indications from the *Utahan's* earnings), the average resulting bareboat equivalent would have been $5.62 per deadweight ton per month, after deducting the average owner's expense factor of $1.88.

Admittedly, the War Shipping Administration realized a profit by the carriage of commercial and lend-lease cargo on freighters which it had requisitioned or owned. No evidence has been adduced by defendant to show that the general levels of earnings of freighters from carriage of commercial and lend-lease cargo for defendant's account during the requisition years was any lower than the prerequisition levels.

20. Immediately after release from requisition in 1946, American freighters found good business. When plaintiff's vessels were released, their earnings in 1946 for plaintiff's account in foreign overseas berth service averaged $4.93 per deadweight ton per month. The fact that such earnings were realized notwithstanding the cessation of hostilities which previously had caused military demands to absorb new construction, is further evidence that the commercial earnings power of freighters throughout the requisition period had equalled or exceeded its prerequisition level.

21. The fair and reasonable market value of the use of the steamer *Hawaiian* on bareboat basis throughout the

period of defendant's requisition of her use on such basis from July 7, 1943, to May 1, 1946, was from $5.00 to $6.00 per deadweight ton per month. (See Findings Nos. 11-20.) That value was being realized by the plaintiff immediately prior to the vessel's entry on Government service in January 1942 and could reasonably have been realized by the plaintiff if the vessel had not been taken by defendant, but had remained in plaintiff's possession and control.

22. The above findings set out facts which are not materially controverted and which are the basis of plaintiff's theory of the case. In short, it is plaintiff's theory that at the time of the requisition there was no free market and, therefore, the Court should consult the nearest free markets in point of time, in view of proof that the factors influencing such free market, that is supply and demand, prevailed throughout the period of requisition and would have been effective had the market remained free.

23. The defendant's theory of the case is likewise based on facts that are largely uncontroverted. It is a fact that after the Ship Warrants Act became effective the Maritime Commission and the War Shipping Board, by coercive measures pursuant to such Act, by collaboration with the British and with insurance underwriters, made it progressively impossible for American Shippers to operate without acceptance of the Government's schedule of rates, with the consequence that such rates came to be accepted by a substantial majority of such shippers. Having arrived at this situation, the defendant says its rates were the market or prevailing rates.

The defendant makes no contention that such rates bore any relation to the rates existing in the nearest free market or that such free market rates would not have remained at least as high had the market remained free. In fact, the record is replete with claims by the defendant that it destroyed the free market and effected a substantial roll back of rates. It must be remembered that, as stated above,

the Comptroller General ruled that the enhancement clause in Section 902 (a) of the Merchant Marine Act of 1936, prohibited the payment of compensation for vessels to the extent that it might be based upon values in excess of the values existing on September 8, 1939, provided such excess be determined as due to economic conditions directly caused by the national emergency. In defending its rates in the face of this ruling, the Maritime Commission and/or War Shipping Board have pretty well presented the arguments for plaintiff herein. Plaintiff's exhibits 51, 54 and 78 contain examples of such statements.

24. The charter rates promulgated from time to time by the United States Maritime Commission and the War Shipping Administration in the course of administering the Ship Warrants Act of July 14, 1941, and the subsequent requisition programs were not market rates nor equivalent to probable fair market rates. They were rates promulgated in furtherance of an admitted purpose of those agencies to acquire for defendant, by coercion and other means, the use of privately owned American merchant vessels at rates of hire fixed by those agencies at levels representing drastic reductions in current market rates of charter hire, instead of being fixed at levels commensurate with the earning power which those vessels then had and continued to have for commercial purposes. The facts concerning the administrative acts of the Commission and the War Shipping Administration are set forth more fully in Findings Nos. 25 through 35.

25. The so-called Ship Warrants Act of July 14, 1941, authorized the United States Maritime Commission and its successor, the Administrator, War Shipping Administration, to prescribe certain conditions to be complied with by such shipowners or charterers as might undertake to do so as a condition of obtaining a license called a "ship warrant" entitling their vessels to priority in the use of certain shore facilities, specified in Section 3 of the Act, in ports

under jurisdiction of the United States. Among the conditions so authorized to be prescribed was an undertaking "with respect to * * * the fair and reasonable maximum rate of charter hire or equivalent." The policy required to be followed by the Commission in the administration of the Act was "to make fair and reasonable provision for priorities with respect to" the importation and transportation of substantial quantities of materials described in Section 4 of the Act.

When the Ship Warrants Bill [H. R. 4700], was reported favorably to the House on May 12, 1941, by the Committee on the Merchant Marine and Fisheries, the Committee report stated, in part:

> The legislation does not contemplate governmental prescription of rates now agreed to by conferences, but would accord a measure of control over shipping by means of a commercial bargain with vessel owners and charterers.

When the Ship Warrants Bill was before the Senate Committee on Commerce, the Maritime Commission submitted to the Committee a written statement containing the following representation:

> *Conclusion.*—The bill is designed and will be administered only as priorities legislation, a regulatory plan for which there is ample legislative precedent and which will meet a vital need of our defense and our domestic economy.
>
> The bill does not authorize nor will it be administered as a direct or indirect means of taking property or putting it to a public use without just compensation.

The schedules of rates of charter hire and other conditions prescribed by the Maritime Commission or its successor from time to time, as hereinafter set forth, in the course of administering the Ship Warrants Act were incor-

porated in written "Uniform Conditions." A ship warrant would not be issued to an applicant who did not undertake to observe such "Uniform Conditions."

Although plaintiff did apply to the Commission on September 25, 1941, and on October 3, 1941, for ship warrants for its vessels, plaintiff did not incorporate in its application an undertaking to observe the "Uniform Conditions." The Commission declined to issue warrants and returned the application to the plaintiff.

26. The measures taken by the United States Maritime Commission or its successor, War Shipping Administration, in the course of administering the Ship Warrants Act of July 14, 1941, included the following:

(a) On July 30, 1941, in Press Release 970, the Commission issued "a scale of maximum time charter rates for United States and foreign flag vessels in which the Commission will concur for charters in which their concurrence is indicated on and after August 1, 1941."

Such scale provided for basic time charter hire at the rate of $4.50 per deadweight ton per month for steamships of 10,000 deadweight tons and up, with an additional 10¢ for each ½ knot of speed in excess of 12 knots. The basic rates for steamers of lesser deadweight tonnage were somewhat higher, the rate for a steamer of the *Hawaiian's* tonnage being $4.60 per deadweight ton per month. Such rates were admittedly about 35% below the existing time charter rate of $7.50 approved by the Commission. No change was made in berth rates.

No advance notice of the schedule was given to shipowners to be affected, nor was any prior or subsequent opportunity afforded to them for a public hearing or for presentation of evidence and argument in opposition. No findings whatever were made either that the schedule was in any way necessary or appropriate "to make fair and reasonable provision for priorities" with respect to the transportation of any of the materials specified in Section

4 of the Ship Warrants Act. No evidence was stated which would support such a finding or would tend to show that, either in order to give priority to such transportation or by another standard, it was "fair and reasonable," at a time when the demand for shipping was admittedly increasing, to prescribe maximum time charter rates more than one third below existing market rates theretofore approved by the Commission.

No witness was produced by defendant, in this suit, to testify concerning the basis on which the scale of rates prescribed in Press Release 970 was prepared by the Commission, but the record contains an uncontradicted admission to Congress by an official of the Commission that the prescribed time charter rate of $4.50 per deadweight ton per month "represented an arbitrary reduction of $3 per ton under what had been more or less considered a going rate prior to that time."

(b) The schedule of time charter rates contained in Press Release 970 formally became part of the ship warrants procedure by its incorporation into the "Uniform Conditions" issued in connection with the "Ship Warrants Rules and Regulations," dated August 14, 1941, and approved by the President, August 26, 1941, to become effective thirty days thereafter.

(c) On January 5, 1942, the Commission issued its Press Release 1117 making public the Commission's General Order No. 49, dated December 30, 1941, and to be effective January 20, 1942, reducing the maximum time charter rates which warrant-holding vessels were required to observe to levels about 28% below those in Press Release 970.

The new basic maximum time charter rate on steamers of 10,000 deadweight tons and up was $3.25 per deadweight ton per month, compared with the rate of $4.50 prescribed by Press Release 970. An additional 10¢ per deadweight ton per month was allowed for each knot of speed in excess of 10 knots up to 14 knots. For steamers of the *Hawaiian's* tonnage, the new basic maximum rate was $3.35 per dead-

weight ton per month, as compared with the previous maximum of $4.60. After speed adjustments, the new rate for a steamer like the *Hawaiian* would have been $3.55, as compared with the previous maximum rate of $4.60 under Press Release 970.

As in the case of Press Release 970, no advance notice or hearing was given to shipowners regarding Press Release 1117. Nor were any findings made or evidence indicated by the Commission tending to show why, a few weeks after Pearl Harbor and the consequent further increase in demand for and in the operating expenses of shipping, it had become "fair and reasonable" to reduce the maximum rates prescribed in July 1941 by Press Release 970 or why such a reduction was necessary or appropriate "to make fair and reasonable provision for priorities with respect to" the transportation of materials specified in Section 4 of the Ship Warrants Act.

No witness was produced by defendant to show how the new schedule was prepared.

(d) Berth rates and certain other rates charged by the operators of warrant-holding vessels were also required by General Order No. 49 and Press Release 1117 to be so adjusted as not to be "in excess of the charges for such service or arrangements in effect September 1, 1940 * * * plus such reasonable additional surcharge as may be approved by the Commission" to cover increases in operating expense subsequent to September 1, 1940, and such requirement was incorporated into the ship warrant procedure by means of revised "Uniform Conditions" issued January 13, 1942.

The Commission's order was not accompanied by any findings or statement of evidence to show why, in January, 1942, a "roll back" to berth rates existing on September 1, 1940, (except as modified by approved surcharges), had become "the fair and reasonable maximum rate of charter hire or equivalent".

No witness was called by defendant in this case to explain the selection of September 1, 1940, as the date to which berth rates, (before surcharges), were to be rolled back.

Surcharges on berth rates were, in fact, authorized by "rate orders" of the War Shipping Administration issued throughout the period 1942-46 until the Warrant Act Regulations were revoked in 1946.

The defendant did not offer any evidence to show the actual net effect of the "roll back" when considered together with the surcharges. Nor did defendant offer any evidence to show how, in fact, the levels of earnings of vessels requisitioned or owned by the War Shipping Administration and operated in foreign overseas berth trades, compared with prerequisition levels of earnings in those trades. The earnings of plaintiff's steamer *Utahan* while under requisition (See Finding No. 19), indicate a continuance of the prerequisition level of berth earnings in one trade, at least.

(e) At the request of the War Shipping Administration, the American Institute of Marine Underwriters and British Underwriters adopted a special provision called a "Ship Warrant Warranty," to be inserted in ship hull insurance policies issued on and after February 20, 1942, making the holding of a ship warrant a condition of the validity of the insurance.

(f) After February 2, 1943, "nonwarrant holding vessels" were forbidden to use a "facility" without special authorization obtained by application to the War Shipping Administration. Such special authorizations were issued infrequently. The effect was to prohibit such vessels from obtaining repairs, fuel, stevedoring and towage in United States ports, even though the furnishing of such services would not interfere with service to a warrant holding vessel.

Before the War Shipping Administration brought the "Ship Warrant Warranty" device into operation and, later,

denied all use of shore facilities to vessels not holding warrants, the Warrants Act had been ineffective to compel operators to obtain warrants merely because of the priority accorded to warrant-holding vessels in the use of shore facilities.

There is no other evidence in the record to explain why it was considered necessary or appropriate to deny insurance and essential services to nonwarrant holding vessels, instead of merely giving priority to warrant-holding vessels in the use of shore facilities as provided in Section 3 of the Ship Warrants Act.

(g) In addition to the above listed general administrative orders, specific instances appear in the record of coercive actions by the Maritime Commission.

Plaintiff was required to time charter vessels to the Commission during the last quarter of 1941 at rates of $4.50 to $4.60 per deadweight ton per month as prescribed in Press Release 970, although the plaintiff then had five of its vessels operating at rates of $7.00 per deadweight ton per month under time charters made in June 1941 to private operators.

At about the same time, States Marine Corporation was required to time charter two newly acquired vessels to the Commission at rates of hire about $2.00 per deadweight ton per month less than the hire under the last previous charters of the vessels to private operators.

Discriminatory action against shipowners operating in the domestic trades was taken in connection with the Warrant Act regulations and "uniform conditions". Operators of warrant-holding vessels engaged in the domestic trade were required to make their vessels available to berth operators in the foreign trade. Where such vessels were time-chartered by their owners to the berth operators, the owners received hire only at the depressed rates prescribed in Press Release 970 or Press Release 1117, whereas the berth operators would collect freights at the nondepressed berth rates.

On the other hand, vessels owned by the Commission and chartered to others, and vessels chartered by the Commission from others received warrants without the necessity of an undertaking by their operators to observe the schedules of rates prescribed in connection with the Warrants Act.

The Commission also required vessels to engage in and to accept reduced rates for transportation having no apparent connection with the movement of materials specified in Section 4 of the Ship Warrants Act.

27. Prior to the general requisitioning in April 1942, many shipowners protested against the schedules of rates prescribed for warrant-holding vessels. There were no unqualified acceptances of the P. R. 1117 scale of rates. As a result, readjustments were allowed by the War Shipping Administration by means of "escalator clauses" and by giving the subsequent time charter requisition rates retroactive effect to January 20, 1942.

After the general requisitioning in April 1942, the [illegible]te schedules issued in connection with the Warrants Act became largely academic to American shipowners because their vessels then ceased to be operated for their account and any profits or losses resulting from operations under the prescribed rates were for account of the War Shipping Administration.

28. Following the general requisition on time charter basis in April 1942, the War Shipping Administration on May 14, 1942, issued its General Order No. 8, establishing a scale of requisition time charter rates at amounts intermediate between those in the Maritime Commission's Press Release 970 of July 30, 1941, and those in the Commission's Press Release 1117 effective January 20, 1942. The new scale was made retroactive to January 20, 1942.

Under the General Order 8 scale, steamers of 10,000 deadweight tons and up received time charter hire at $3.75 per deadweight ton per month on sailings prior to May 16, 1942, and at $4 on sailings on and after May 16, 1942. Under

Press Release 970 the basic rate for such vessels was $4.50 (see Finding 26a), whereas, under Press Release 1117, the rate was $3.25 (see Finding 26c).

Steamers of the *Hawaiian's* tonnage were allowed, under General Order 8, a basic rate of $3.90 on sailings prior to May 16th and $4.15 on later sailings.

29. Before issuing General Order No. 8 on May 14, 1942, the War Shipping Administration made an investigation of the average cost of operating various classes of vessels built before 1937 and prepared a proposed scale of requisition time charter rates for such vessels. In connection with its investigation, the War Shipping Administration had required owners to submit reports showing the financial results of some 597 voyages terminating in the last quarter of 1941 or early in 1942.

The rates in the proposed scale were the sum of two components: (a) a so-called "bareboat" factor of $1.00 per deadweight ton per month (with certain speed premiums and an "off-hire" allowance of 10%) was proposed as "an acceptable rate" for the bare use of requisitioned vessels; and (b) a factor to represent the average of shipowners' costs under the proposed form of requisition time charter, together with an allowance for owner's "overhead."

(a) Admittedly, the proposed "bareboat" component of $1.00 per deadweight ton per month, was not based on any approximation of the earnings then being realized by shipowners from commercial employment of their vessels, although full information about such earnings was available from owners' voyage reports mentioned above and from the Administration's own studies in Defendant's Exhibit 17. The former Director of Fiscal affairs of the War Shipping Administration expressly admitted that the requisition rates had no relation whatever to the earning power or the value of the use of the requisitioned vessels. He said: "we got together a lot of information and we

thought that the best way to fix the rate was to fix it on as low a basis as we possibly could. * * * We know that in 1941 the ships were earning quite a lot of money, and that the rates that were published in General Order No. 8 were nowhere near as high as the earnings the companies were making in 1941."

(b) The expense factor in the proposed rates was compiled from statistics on the average vessel expense for crew's wages, subsistence of crew, stores, supplies, equipment, repairs, other vessel maintenance expense and insurance and from statistics on the average overhead expenses of 16 shipping companies for the year 1940. The resulting figures were weighted for certain known or anticipated increases in costs and for periods of "off hire."

The principal study of actual vessel expense related to 60 voyages terminating in the last quarter of 1941 by freighters over 20 years old and having from 8,000 to 8,999 tons deadweight capacity.

Admittedly, as the expense factor assumed was a mathematical average, some owners were sure to receive more than the so-called "bareboat" factor as compensation for the use of their vessels on a time charter basis and some owners would receive less.

The vessel expenses and overhead shown by the studies fluctuated so widely and would, therefore, cause such wide variations in compensation to owners under a time form operation that the Director of Fiscal Affairs recommended that the Administration substitute a bareboat basis of operation, but the recommendation was not followed at that time. In 1943, however, a general requisition on bareboat basis occurred. (See Finding No. 31.)

To determine the proposed rates for vessels in tonnage classes below and above the 8,000-8,999 ton class, additions or subtractions were made to adjust for assumed differences in average vessel operating costs on a deadweight ton basis.

With respect to overhead, the study showed variations similar to the variations in vessel expense. Admittedly, much of the overhead expense covered by the study was unnecessary for the performance of the mere vessel "husbanding" required under a time charter form of operation.

30. The proposed scale of requisition time charter rates referred to in Finding No. 29 was then discussed at a meeting held May 9th-11th, between representatives of the War Shipping Administration and an invited group of officials (for convenience, hereinafter called the "owner group"), representing about a dozen shipping companies, seven of which were holders of operating differential subsidy contracts with the Maritime Commission and two were subsidiaries of steel companies. The proposed scale was not given to the owner group before the meeting.

Altogether there were nearly 200 American companies owning vessels of 1,000 gross tons or more (not including tankers), whose use or title was requisitioned.

At the meeting, the Director of Fiscal Affairs told the owner group that if there were not general acceptance of "a rate that I thought was low enough," he would recommend requisition of title to their vessels.

The owner group declined to discuss rates composed of stated component parts and that feature of the proposed rates was eventually dropped, but owners' costs under time charter form of operation of freighters in the 8,000-8,999-ton class were discussed between a subcommittee of the owner group and the Comptroller of War Shipping Administration and various adjustments were made to bring the total proposed rate to $4.10 for freighters in the 8,000-8,999-ton class on sailings after May 16, 1942.

Finally, after some of the owner group had said they would recommend acceptance if 25 cents per deadweight ton per month were added to bring the rate as a whole to $4.35, such addition was made. No clear explanation was given of the calculation of the rates of hire applying to

vessels having tonnages greater or less than those in the 8,000-8,999-ton group.

Plaintiff's representative stated that plaintiff probably would not accept.

One of the owner group definitely declined to accept and his vessels were requisitioned for title. There were admittedly disputes about the rates with other owners and their ships were either requisitioned for title or for use on bareboat basis.

A diversity existed in the owner group in respect of financial considerations weighing for or against acceptance of the proposed rates. Owners having operating differential subsidy contracts received certain tax exemptions on their profits. Others had special agreements with the Treasury Department for accelerated depreciation. In other cases, acceptance was necessary, as the only alternative to litigation, in order to obtain reimbursement for expenses incurred from operating vessels on requisition status or on unexecuted time charter status from dates as far back as January 1942. In plaintiff's case, such unreimbursed outlays amounted to about $2,000,000 at the time when the requisition time charter rates were tendered for acceptance.

It is true that defendant claims a widespread acceptance of its rates under the requisition time charters initiated in April 1942, as evidence of which it has introduced its Exhibits 8 and 8A, which contain a list of some 390 vessels belonging to 79 owners, for which requisition time charters were signed by the owners. Not only does said list fail to show that such charters were signed by all affected owners, but their signing is in reality not evidence of their consent to or approval of the rates of hire.

In a requisition on a time charter basis the Government requisitioned much more than the ship itself. It requisitioned the service of the owner and the outlay by the owner of money in order to discharge such owner's obligations under the time form charter. In order to obtain funds with which to defray outlays, many ship owners, as in the case

of the plaintiff, were forced to sign the charters. Moreover, it has been shown that many of such charters were not signed until a much later date, in connection with other settlements by transfer of title or otherwise.

31. In November 1942, a dispute occurred between the Comptroller General of the United States and the Administrator, War Shipping Administration, regarding the application of the so-called "enhancement clause" of Section 902 (a) of the Merchant Marine Act, 1936, to the determination of just compensation for requisitioned vessels. As a result of a notice issued December 17, 1942, the Administrator commenced to withhold 25% of the hire payable under the terms of the requisition time charters. Thereafter, the *Hawaiian* was requisitioned on bareboat basis (See Finding No. 1), and similar requisitions of plaintiff's other vessels followed.

On October 15, 1943, the President appointed an Advisory Board on Just Compensation, which on December 7, 1943, rendered a report of its views on the principles which should be followed by the Administrator in determining just compensation.

Meanwhile, by notices dated October 15, 1943, November 1, 1943, and November 24, 1943, the Administrator instituted a "Revised Program of Ship Requisition, Charter and Operation," which, in effect, provided for termination of the requisition time charters then remaining in force and for a general requisition on bareboat basis. Exception was made for cases where owners might elect to remain on time charter basis but with a revised form of charter and at revised rates.

Thereafter, the compensation offered by the War Shipping Administration for the use of vessels requisitioned on bareboat basis was fixed by General Order No. 37, issued on April 7, 1944.

32. The basic rate of bareboat charter hire provided by General Order No. 37 for all dry cargo vessels built during the period 1914-34, was $1.25 per deadweight ton per month. That was the same as the "bareboat" component of $1.00 per deadweight ton per month originally proposed by the

War Shipping Administration in May 1942 (see Finding 29a), combined with the additional allowance of 25¢ per deadweight ton per month made as a result of discussion with the owner group immediately prior to the issuance of General Order No. 8 on May 14, 1942. (See Finding 30.)

In a memorandum submitted on April 15, 1944, to the House Committee on the Merchant Marine and Fisheries, the Administrator, War Shipping Administration, stated that "the proposed basic rates of General Order 37 are:

(1) Below actual earnings of 1940 and not greatly in excess of earnings of 1939;

(2) Only about 40 percent of the rate recently fixed by the court in the *Olson* case;

(3) Only about 40 percent of the bareboat rates paid by the Army and Navy in 1941;

(4) Less than one-third of the rate fixed administratively in the first war;

(5) About one-third of the actual earnings of 1941;

(6) About one-fifth of the rates allowed by the courts in the first war; and

(7) Less than the average bareboat rates charged by the Maritime Commission in 1940 and 1941.

General Order No. 37 was prepared by the Division of Large Vessel Procurement of the War Shipping Administration under the supervision of the Assistant Deputy Administrator for Fiscal Affairs. None of the Administration staff responsible for preparation of the order, including the "findings" contained in it directly or by reference, had had experience as a shipowner, operator or broker. No hearings were held in connection with the determination of the bareboat rates, notwithstanding a written request for such a hearing submitted on December 31, 1943, by the Association of American Ship Owners, of which plaintiff was a member, and, in fact, the terms of the order were kept confidential prior to its issuance.

The principal preliminary "findings" in connection with determination of the rate of hire for freighters built prior to 1935 were that no market existed at the time of the bareboat requisitions and that the value of the use should be determined in accordance with the Advisory Board's Rule 3 which stated the factors to be considered and the method to be followed in determining probable market value in situations where there is no actual market.

The method actually used by the W. S. A. staff was to concentrate on two "factors" each of which, they found, showed that an amount of about $1.25 per deadweight ton per month would be just compensation for bareboat use. The two "factors" were:

(a) The average amount of "adjusted earnings under current charters," (i. e. under the requisition time charters); and, alternatively,

(b) A sum sufficient to provide for (i) annual "depreciation" on the valuation of the vessels, and (ii) "a reasonable rate of return" on such valuation.

Further facts regarding those two alternative factors and the subsidiary "findings" of the War Shipping Administration staff in connection with those factors, are stated in Findings 33, 34, and 35.

In substance, however, the general procedure was to derive compensation for bareboat use from the rates of hire and war risk insurance valuations fixed by the Administration itself in General Orders Nos. 8 and 9 issued in May 1942, in connection with the general requisition on time charter basis in April 1942.

The procedure in connection with the first "factor" consisted of applying arbitrary "adjustments" to average earnings of requisitioned vessels obtained from charter hire at General Order No. 8 rates.

The procedure in connection with the second "factor" consisted in applying an arbitrary rate of "depreciation" to the average war risk insurance valuation fixed in General Order No. 9 and then applying an arbitrary "rate of return" to such depreciated valuation.

The ultimate result of those procedures was the further arbitrary conclusion that compensation for bareboat use under General Order No. 37 should be the same amount as the Administration had intended to allow as the "bareboat factor" of compensation under General Order No. 8.

33. In connection with the first factor, the staff found that the "adjusted earnings" of the average dry-cargo vessel built prior to 1935 had amounted to $1.275 per deadweight ton per month under the requisition time charters.

This procedure of using as evidence of just compensation for use under the bareboat requisitions the "adjusted earnings" under the scale of rates fixed by the Administration on its prior requisition on time charter basis, was explained on the ground that the requisition time charters were the only "hirings" immediately before the general bareboat requisitioning.

No effect was given to the earnings which requisitioned vessels had realized for their owners immediately prior to defendant's taking of the vessels in April 1942, the reason given for such omission being, in substance, that such earnings were considered to be no longer available to private shipowners. In fact, as shown by the evidence summarized in Findings 18-21, such earnings could have been realized by private shipowners throughout the requisition period if the vessels had remained free of requisition.

The earnings then actually being realized for the defendant by the same owners as agents for the War Shipping Administration from the use of the same vessels for carriage of nonmilitary cargo were also admittedly disregarded, the explanation being that such earnings had not been segregated from the general results of all cargo operations and the staff was too busy to compile the data. This explanation seems irreconciable with the fact that income from carriage of commercial and lend-lease cargo was segregated in budgetary statements submitted to Congress by the War Shipping Administration. (See Finding 19.) Also, the explanation is irreconcilable with the fact that the staff had taken time to segregate and compile data on the

revenue and expense of the shipowners' operations under the requisition time charters.

Apart from the foregoing considerations showing the immateriality of the statement of "adjusted earnings" under the requisition time charters, the evidentiary value of the statement itself is affected by the following circumstances. It was prepared by persons not called as witnesses, was based on data not made available at the hearings, and consisted, in part, of deductions of estimated amounts for "deferred repairs," and "allowance for risks" and "overhead" which defendant's witness on the subject was unable to substantiate and which, in fact, had no material application to the *Hawaiian.*

A comparison of the actual audited figures of the plaintiff and of States Marine Corporation for all their operations under the requisition time charters, and the War Shipping Administration figures shows the following result:

Comparison of W. S. A. estimate of "adjusted earnings" under requisition time charters with actual earnings of plaintiff and of States Marine Corporation

Items		W. S. A. estimate (Def. Ex. 19B)	Plaintiff (Pl. Ex. 68)	States Marine (Pl. Ex. 73)
1. Actual charter hire		$4.098		
2. Allowance for accrued off hire		.066		
3. Adjusted charter hire		4.032	$3.96	$4.30
4. Reported operating costs	$1.882			
5. Allowance for deferred repairs	.215			
6. Allowance for risks	.250			
7. Adjusted operating costs		2.347	1.89	*1.93
8. Adjusted earnings before overhead		1.685	2.07	2.37
9. Allowance for overhead		.41	**.17	†0
10. Adjusted earnings		1.275	1.90	#2.37

* Includes $45,343.71 of disputed items of expense equivalent to $0.09 per deadweight ton per month.

** At $60 per day, being the husbanding fee allowed by the W. S. A. to General Agents.

† Husbanding expense is included in operating costs. (*McGrath*, p. 1898.)

The actual figure in Plaintiff's Exhibit 73 is $2.40. The figure of $2.37 appearing in the above table is derived from use of months of 30 days each for convenience in calculating the number of "deadweight ton months."

The foregoing table further demonstrates the unreasonableness of the defendant's use of "adjusted earnings" of all freighters under the requisition time charters as a basis for determination of just compensation for the use of plaintiff's vessels under bareboat requisition.

34. In connection with the second alternative "factor" claimed to support the rate of $1.25, three subsidiary "findings" were made by the War Shipping Administration staff:

(a) That the average valuation of requisitioned dry-cargo freighters built prior to 1935 amounted to $75 per deadweight ton as of April 1942 when the general requisitioning on time charter basis had occurred;

(b) That the average anticipated remaining life of such vessels after April 1942 was eight years and their consequent annual rate of "depreciation" was 12½%.

(c) That annual hire at the rate of $15 per deadweight ton (equivalent to $1.25 per deadweight ton per month), would provide both: (i) "a reasonable rate of return" of $5.625, representing 10% of $56.25, the average depreciated valuation of the vessels per deadweight ton as of April 1944; and also, (ii) $9.375, representing the amount of annual depreciation on the average value of $75 (as of April 1942), at the annual rate of 12½%.

(a) The subsidiary finding that requisitioned freighters built prior to 1935 all had a value of $75 per deadweight ton in April 1942, was made merely as a premise of the subsequent finding (c), that the depreciated value of such freighters in April 1944 was $56.25 per deadweight ton.

No factual justification appeared for lumping all such vessels together and assigning them the same valuation. On the contrary, the Administration's Division of Statistics and Research found, in respect of the sales and appraisal

data studied covering dry cargo vessels of 7,000 to 12,000 tons deadweight, that:

> Any trends or central tendencies noted in this study are qualified by the fact that the number of dry cargo vessels and tankers under consideration is small, probably too small for statistical analysis. Furthermore, vessels of the size included here are quite individualistic in character and would show a high degree of dispersion from any median or average. The best that the data have to offer are some suggestions and tentative conclusions.

Eight "elements" were stated to have been considered in arriving at the April 1942 valuation finding. Of these, two relating to depreciated construction cost were admittedly of small significance. The significance of an "element" consisting of two private sales occurring in January and February, 1941, and another "element" consisting of a "peak sale" also in 1941, was unexplained. It was also admitted that no weight was given to the "element" of average sales in 1941 from the government's laid-up fleet. Except for three appraisals in 1943, the "element" of appraisal data consisted of some 18 appraisals in March, April, and May 1942, of which 15 were by the Maritime Commission itself.

The final and controlling "element" consisted of "values under current charters" and the figure of $75 per deadweight ton shown by this "element" was the one actually adopted. In fact, that figure was nothing more than the valuation which the assumed average vessel would have under the scale fixed by the War Shipping Administration itself in General Order No. 9 for purposes of war risk insurance under the requisition time charters.

The foregoing is not substantial evidence of the value which all requisitioned dry cargo vessels built before 1935 had in April 1942.

There was no evidence whatever to show the valuation of the vessels at the times of their takings under the gen-

eral bareboat requisition or as of April 1944 when General Order No. 37 was issued. Nor was there any evidence to show to what extent, if any, valuations made as of April 1942, even if fair and reasonable, were relevant to determinations of value in April 1944.

(b) The second subsidiary finding above mentioned, that, because of assumed obsolescence, such vessels had only an eight year remaining life and a consequent annual depreciation of 12½% commencing in April 1942, was admittedly unsubstantiated by any facts submitted in evidence at the trial.

It was admitted that the rate of 12½% per year was inconsistent with the appraisal data and the sales data. It was also admitted that the age-spread of twenty years in the vessels under consideration had been disregarded for purposes of determining depreciation.

As of April 1952, all ten of plaintiff's vessels which had been redelivered from bareboat requisition in 1946 were still in commercial operation, with the exception of one which had been lost. These vessels had been built at various dates between 1912 and 1921.

At a hearing on May 6, 1947, an official of the Maritime Commission stated that old vessels were bringing $80 to $90 per ton right after V-J Day.

(c) The third subsidiary finding, that a 10% rate on the assumed valuation of the vessels as of April 1944 was a "reasonable rate of return," is unsupported by any evidence whatever and admittedly was only the opinion of the War Shipping Administration's staff "of what public opinion would consider a reasonable rate of return."

It was further admitted that no rule of the Advisory Board authorized the use of public opinion as a criterion for determining just compensation.

The portion of the same subsidiary finding to the effect that the hire should include the assumed annual rate of depreciation at 12½% was likewise unsupported by any

commercial practice or other substantial evidence and was not shown to have any connection with the earning power or value of the use of the requisitioned vessels.

35. There was not any subsidiary finding by the Administrator nor any substantial evidence to show that the rate of $1.25 per deadweight ton per month was the rate which would probably result from fair negotiations between an owner willing to let and a charterer willing to hire the *Hawaiian*, or a similar vessel, on or about July 7, 1943, or at any other time during her requisition period.

36. In their respective views of the issues the parties have not reached the question of deductible enhancement in any specific way. It is presumed that plaintiff was not interested in establishing offsets to the nearest free market values. The defendant's values admittedly represent a substantial roll back from the latest free market, and there is no claim that they include any deductible enhancement.

However, the evidence of the circumstances and factors from which the Court can weigh the influence upon the nearest free market of the need, or prospective need for ships of the type of the *Hawaiian* is in the record, or such circumstances and factors are matters of common knowledge, of which the Court may take judicial notice.

It is believed that the proportion of deductible enhancement existing could never be susceptible of exact mathematical measurement, and must necessarily be determined upon a consideration and evaluation of the factors bearing thereon. Taking all these matters into consideration, bearing in mind the world and home market before and during this country's participation in the war, and giving weight to the progressive preoccupation of this country with steps looking toward participation in the war, the conclusion is reached that a bareboat rate of not less than $3.00 per month per deadweight ton for the *Hawaiian*, during the period of bareboat requisition, would constitute just compensation, and would not include any enhancement due to the Govern-

ment's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking reasonably probable.

Respectfully submitted.

CURRELL VANCE,
Commissioner.

ARGUMENT AND SUBMISSION OF CASE.

On April 6, 1954, the case was argued and submitted on the merits by Mr. Clement C. Rinehart for the plaintiff and by Mr. J. Frank Staley for the defendant.

OPINION OF THE COURT BY WHITAKER, JUDGE, FINDINGS OF FACT AND CONCLUSION OF LAW.

(Decided October 5, 1954.)

MR. CLEMENT C. RINEHART for plaintiff. Messrs. CARL H. WATSON, JR., and KIRLIN, CAMPBELL & KEATING, were on the briefs.

MR. J. FRANK STALEY, with whom was MR. ASSISTANT ATTORNEY GENERAL WARREN E. BURGER, for defendant. MR. WILLIAM A. MELLAN was on the brief.

OPINION.

WHITAKER, Judge, delivered the opinion of the court:

The issue presented in this case is the just compensation to which the plaintiff is entitled for the taking by defendant under a bareboat charter, of the possession and use of the American steamship *Hawaiian* during the period from July 7, 1943, to May 1, 1946.

Plaintiff says that it is entitled to a rate of $6.00 per deadweight ton per month throughout the requisition period less the amounts already paid by defendant on account, plus interest, as a part of just compensation, at the rate of 4

percent per annum on each monthly installment beginning August 1, 1943, and continuing to the date of payment of the judgment herein, subject to certain adjustments.

Defendant says that the "bareboat requisition rate" should not exceed that fixed by the War Shipping Administration, which was $1.25 per deadweight ton per month, plus appropriate allowances for the *Hawaiian's* deadweight tonnage and speed.

The *Hawaiian* was a steam freighter built in 1919, of 9,460 deadweight tons, and with a speed in excess of 12 knots. Her particulars are further described in finding 4.

On July 7, 1943, the War Shipping Administration, acting pursuant to section 902 (a) of the Merchant Marine Act of 1936, 49 Stat. 2015, as amended, 46 U. S. C. §1242, requisitioned the *Hawaiian* on a "bareboat" basis. It retained possession and use of the vessel until it was redelivered to plaintiff on May 1, 1946.

On July 31, 1944, approximately a year after the requisition, the War Shipping Administration tendered plaintiff a bareboat form of charter party for the *Hawaiian* containing, *inter alia*, an offer of hire at the rate of $12,108.80 per calendar month. This was at the rate provided by War Shipping Administration General Order No. 37, issued April 7, 1944, which fixed a basic rate of bareboat charter hire for dry cargo vessels built during the period 1914—1934 at $1.25 per deadweight ton per month, plus certain allowances for vessels having speeds equal to or in excess of 10½ knots. The hire tendered for the *Hawaiian* was at the rate of 1.28 per deadweight ton per month, the sum of the basis rate established by General Order No. 37, plus an additional 3 cents allowed for vessels with speeds exceeding 10½ but less than 12 knots. As the *Hawaiian's* speed exceeded 12 knots, she was entitled under General Order No. 37 to 6 cents, instead of 3 cents, in addition to the basic rate of $1.25 per deadweight ton per month.

On August 24, 1944, plaintiff declined to accept either the form of charter or the rate of hire offered. As required

by section 902 (d) of the Merchant Marine Act of 1936, *supra,* defendant made monthly payments to plaintiff, between March 24, 1944, and August 16, 1946, aggregating $307,079.74 for the use of the *Hawaiian.* The aggregate amount of these payments on account is equivalent to hire at the rate of 96 cents per deadweight ton per month for the bereboat requisition period, or 75 per cent of hire at the rate of $1.28 per deadweight ton per month.

Plaintiff sues to recover hire at the rate of $6.00 per deadweight ton per month, less the amount already received by plaintiff on account, or net compensation of $5.04 per deadweight ton per month for the bareboat requisition period of 33 months, 25 days, 5 hours, and 10 minutes, plus interest as a part of just compensation for defendant's delay in payment.

In determining what is just compensation, each case must be decided upon its individual facts, although the courts are guided to their conclusions by certain broad principles, well known, often quoted, and often difficult of application in specific instances. *Dore* v. *United States,* 119 C. Cls. 560, 581. Just compensation has been defined as "the sum which, considering all the circumstances—uncertainties of the war and the rest—* * * * would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy." *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123-124; *Olson* v. *United States,* 292 U. S. 246, 257. This is but another way of saying that fair market value, where there is a free market, is the usual standard of just compensation. *United States* v. *Commodities Trading Corp.,* 339 U. S. 121, 123; *Olson* v. *United States, supra,* p. 255; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 326; *Boom Company* v. *Patterson,* 98 U. S. 403, 407. Where, for any reason, property has no market, resort must be had to other data to ascertain its value, although this "involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with

nicety." *United States* v. *Miller*, 317 U. S. 369, 374. The ascertainment of value is not controlled by rigid rules or artificial formulae; what is required is a "reasonable judgment having its basis in a proper consideration of all relevant facts. *Minnesota Rate Cases*, 230 U. S. 352, 434." *Standard Oil Co. of New Jersey* v. *Southern Pacific Co.*, 268 U. S. 146, 156.

There was no free market for the use of large, ocean-going, American-flag freighters such as the *Hawaiian* at the time of her taking on bareboat basis on July 7, 1943. In April 1942, the use of all such privately owned vessels had been requisitioned on time charter basis by the War Shipping Administration. From that time, if not before, there was no free market for the use of the *Hawaiian*. The court must, therefore, base its determination on other data, even though the inquiry may involve what is "at best, a guess by informed persons." *United States* v. *Miller, supra*, p. 375.

The requirement of the Constitution is that the Government must pay for property it takes a compensation which is "just." By that is meant, of course, what is just to the owner and to the Government. Justice is no absolute term. It frequently requires give and take. For one to demand all that the law allows may do injustice to the other. Shylock, in Shakespeare's *Merchant of Venice*, was entitled under the law to his pound of flesh, but, as we see it today, it would have been an injustice for him to have taken it. Justice is a nice balance of the equities.

This was not so under the old common law of England; but equity intervened to ameliorate the rigors of the law. When our Constitution was adopted, and today, justice means the law tempered by the principles of equity.

Plaintiff says that the level of earnings realized by owners from the use of freighters such as the *Hawaiian* from the carriage of commercial cargo some months prior to the general requisitioning in April 1942 could have been realized by plaintiff throughout the bareboat requisition

period if the *Hawaiian* had not been taken by defendant, but had remained in plaintiff's possession and control.

This is unrealistic. The country was at war. Various and sundry controls had been established that affected the use of plaintiff's vessel. Controls authorized by statute are necessary for the defense of the nation and are lawful, unless they are in conflict with the Constitution. Conditions when the boat was requisitioned were radically different from those existing before the war. What the boat earned before the war is no measure of what she could have earned during the war.

Just compensation for the use of the *Hawaiian* is not to be measured by the value of her use before the market was "interfered with" by the Government, as plaintiff says. In arriving at the amount which probably would have resulted from fair negotiations between an owner willing to let, and a charterer desiring to hire the *Hawaiian*, lawful governmental regulations, restrictions, and controls cannot be ignored. *American-Hawaiian Steamship Company* v. *United States*, 85 F. Supp. 815, aff'd. 191 F. 2d 26, cert. den. 342 U. S. 941; cf. *Smith-Douglass Co., Inc.* v. *United States*, 126 C. Cls. 758, 763. Any just and equitable valuation, fairly reflecting a consideration of all relevant facts, must of necessity take into consideration all of the conditions then existing, including lawful legislative and administrative restrictions on the use of the property valued.

But we are, of course, aware that the constitutional requirements that the Government must pay just compensation for what it takes is one which war does not suspend, alter, or modify. *United States* v. *New River Colleries*, 262 U. S. 341, 343; *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81. The principles to be applied by the courts do not vary, whether the power to take be exercised in time of war or in time of peace.

Defendant contends that the bareboat requisition rate should not exceed the basic rate allowed by General Order No. 37 of $1.25 per deadweight ton per month, plus appropriate allowances for speed.

Defendant's position is also untenable. In the first place, this rate is not binding on the courts. Especially in a case where the rate fixed is not one applicable between private parties, but only as between the Government, who is the taker, and the owner, whose property is taken, a rate fixed by the Government should not be conclusive. The ascertainment of just compensation is not an administrative but a judicial function; no power exists in any administrative agency of the Government to declare what that compensation should be or to prescribe any binding rule in that regard. *Monongahela Navigation Co.* v. *United States, supra,* p. 327; *Gulf Refining Co.* v. *United States,* 58 C. Cls. 559, 576.

While mindful of the complexity of the task confronting the War Shipping Administration, we are of the opinion that any method aimed, as was that of the War Shipping Administration, at the establishment of a rate applicable to all of a large class of dry cargo vessels, is "plainly inaccurate" when applied to any particular vessel. *Gulf Refining Co.* v. *United States, supra,* p. 577. There can be no presumption as to the correctness or the fairness of a rate made applicable indiscriminately to all vessels of a certain class. Although it may be impracticable, from the Government's standpoint, to determine just compensation for each particular vessel, the right to a judicial determination, if the owner is dissatisfied with the compensation determined for his vessel, is guaranteed by the Merchant Marine Act and by the Fifth Amendment. This court, while giving weight to the administrative determination, must nonetheless determine from the facts proven what it thinks is just compensation. *Borland* v. *United States,* 57 C. Cls. 411, 415.

We do not mean to imply that the basic rate established by the War Shipping Administration might not, under appropriate circumstances, be coterminous with just compensation for a particular vessel; but we must conclude on the record before us that the bareboat requisition rate fixed

by defendant as the yardstick to measure just compensation for all vessels of the *Hawaiian's* class is not "just" in her case.

Plaintiff's vessels were used in the intercoastal trade prior to the outbreak of war in Europe in 1939. The testimony discloses earnings for the last quarter of 1939, the last quarter of 1940, and the last quarter of 1941. For these three periods they were $1.29, $2.23, and $3.27 per deadweight ton per month, respectively. On voyages in foreign trade, commencing in 1941 and terminating in 1941 or 1942, including voyages under time charter with the maritime Commission, plaintiff's profits, before overhead, depreciation and taxes, were $4.19 per deadweight ton per month. Exclusive of such voyages under time charter with the Maritime Commission, its profits were $5.13 per deadweight ton per month, before overhead, depreciation, and taxes.

On the other hand, the War Shipping Administration had fixed a rate for time charters of vessels such as the *Hawaiian* at a basic rate after May 1942 of $4.15 per deadweight ton per month, which had been agreed to by the owners, including plaintiff, reluctantly, it is true, and after threat of requisition of title by the War Shipping Administration, but nevertheless agreed to. Applied to the *Hawaiian* this would have amounted to $4.35 on a time charter. As near as we can tell from the testimony, plaintiff's average cost of operation of its vessels under requisition time charters, exclusive of overhead, depreciation, and taxes, was $1.89 per deadweight ton per month.[1] This leaves $2.46. Plaintiff accepted this, although under some compulsion. It cannot be denied, however, that the War Shipping Administration "beat the owners down" as much as they could in establishing a rate of hire.

Prior to requisition on a time charter basis, in April 1942, plaintiff had of course been making high profits. But,

[1] Apparently plaintiff's overhead continued even after requisition on a time charter basis.

even in the absence of restrictions, war conditions would no doubt have reduced these profits; except for the restrictions, they would no doubt have been considerably in excess of the figure of $2.46.

Plaintiff's vessel was old. Its useful life was short. This, of course, affects the rate to be paid.

None of the things we have mentioned give any satisfactory basis for fixing just compensation, but taking everything into consideration, among others the general characteristics of the vessel, her physical condition, her age, her earnings before requisition on a time charter basis and afterwards, the demand for and supply of shipping space, legislative and administrative restrictions, and the uncertainties of the war, we have concluded that $2.50 a deadweight ton per month is "just" both to the owner and the Government.

We do not need to discuss deductible enhancement. The restrictions imposed more than offset any enhancement due to the causes that necessitated the taking. *Smith-Douglas Co., Inc.*, v. *United States,* 126 C. Cls. 758, 767.

Plaintiff is entitled to recover from the defendant hire at the rate of $2.50 per deadweight ton per month, less the amounts paid by defendant on account. In addition, plaintiff is entitled to recover interest, not as interest but as a part of just compensation, at the rate of 4 percent per annum on the unpaid balance of each monthly installment, beginning August 1, 1943, and continuing to the payment of the judgment herein.

Entry of judgment is suspended pending the incoming of a stipulation by the parties showing the amount due, computed in accordance with this opinion. In the absence of such a stipulation within a reasonable time, the case will be remanded to a Commissioner for a report showing the amount due, computed in accordance with this opinion.

It is so ordered.

MADDEN, Judge; LITTLETON, Judge; and JONES, Chief Judge, concur.

LARAMORE, Judge, took no part in the consideration or decision of this case.

FINDINGS OF FACT.

The court, having considered the evidence, the report of Commissioner Currell Vance, and the briefs and argument of counsel, makes findings of fact as follows:

1. At all times relevant to this case, the American steamship *Hawaiian* was wholly owned by the plaintiff, American-Hawaiian Steamship Company, a New Jersey corporation, organized in 1899. On July 7, 1943, at 6:50 p. m., the defendant, acting through the War Shipping Administration, took the possession and use of the *Hawaiian* at Baltimore, Maryland, on "bareboat basis." The taking was by requisition under authority of Section 902 (a) of the Merchant Marine Act, 1936, as amended. Possession and use of the vessel by the War Shipping Administration under such requisition continued until she was redelivered to the plaintiff at Richmond, California, on May 1, 1946, at 12:00 midnight.

2. By letter dated July 31, 1944, the War Shipping Administration tendered plaintiff a demise or "bareboat" form of charter party describing the *Hawaiian* as having 9,460 tons deadweight capacity and setting forth proposed terms of the use of the *Hawaiian* during the bareboat requisition period, including an offer to hire at the rate of $12,108.80 per calendar month. The terms of the charter tendered were those prescribed by War Shipping Administration General Order No. 13, Supplement 1, issued April 7, 1944. The hire offered was specified in War Shipping Administration General Order No. 37, also issued April 7, 1944, "to establish * * * rate of charter hire for self-propelled ocean-going iron and steel vessels * * * requisitioned for use pursuant to the provisions of Section 902 of the Merchant Marine Act, 1936, as amended * * *." Under General Order No. 37, the rate of bareboat hire for dry

cargo vessels built during the period 1914-1934 was $1.25 per deadweight ton per month, with certain additional allowances for vessels having speeds equal to or in excess of 11 knots. The hire tendered for the *Hawaiian* was at the rate of $1.28 per deadweight ton per month, being the sum of $1.25 and an additional $0.03 provided for vessels having speeds equal to or exceeding 11 knots but less than 12 knots. As the *Hawaiian's* speed exceeded 12 knots (see finding No. 4), she was entitled under General Order No. 37 to $0.06 instead of $0.03 in addition to the basic $1.25 per deadweight ton per month.

3. On August 24, 1944, plaintiff wrote the War Shipping Administration declining to accept either the form of charter or the rate of hire offered. As required by Section 902 (d) of the Merchant Marine Act, 1936, as amended, defendant made, between March 24, 1944, and August 16, 1946, monthly payments to plaintiff aggregating $307,079.74, on account of just compensation for the use of the *Hawaiian*. The aggregate amount of such payments on account was equivalent to hire at the monthly rate of $9,081.60 or 96¢ per deadweight ton for the bareboat requisition period of 33 months, 25 days, 5 hours and 10 minutes and was also equivalent to 75% of hire at the rate of $1.28 per deadweight ton per month, tendered by defendant on July 31, 1944.

Thereafter, plaintiff brought this suit to recover, as just compensation for the use of the *Hawaiian*, hire at the rate of $6.00 per deadweight ton per month, less the hire which the defendant has already paid on account at the rate of 96¢, the net compensation claimed being equivalent to $5.04 per deadweight ton per month. In addition, plaintiff also claims compensation for defendant's delays in payment.

Settlement has been made of the claims of plaintiff and defendant, respectively, for consumable stores and fuel aboard the vessel when the requisition period began and ended and also of plaintiff's claims for reconditioning of the vessel on her release from requisition.

4. At all times material to this suit, the *Hawaiian* was a steel, ocean-going, single-screw, steam freighter built in 1919, documented under the laws of the United States, and was classed A1 by the American Bureau of Shipping.

Her deadweight carrying capacity was 9,460 tons and her bale cubic capacity was 413,495 cubic feet. She was designed to carry all types of goods, except liquids in bulk and refrigerated cargo, but was especially well suited for the carriage and handling of general cargo by reason of having three complete decks, an extra (orlop) deck in No. 1 hold, 5 cargo hatches, and 7 sets of cargo gear.

The vessel's propelling machinery consisted of quadruple-expansion, reciprocating engines of 3,400 indicated horsepower and four oil-burning, scotch-type boilers, giving her a speed in excess of 12 knots. By reason of her bunker capacity of 16,306 barrels and daily consumption of 206 barrels, the *Hawaiian* had a cruising radius of 23,420 miles.

The register dimensions of the vessel were: length, 404.6 feet; breadth, 53.9 feet; depth, 26.2 feet. Her draft on summer load line was 28′ 5¼″ and her corresponding gross register tonnage was 6,264 tons.

Her equipment included a heavy lift boom, special lockers for valuable cargo, radio direction finder, electric sounding machine and spare parts in excess of those required by the American Bureau of Shipping.

The crew complement, including master, was 39.

The *Hawaiian* was acquired by plaintiff in 1925 at a cost of $375,000. As of December 31, 1937, her total capital costs to plaintiff had amounted to $414,669.55, and she was carried for tax purposes on the books of the company at a remaining value of $99,859.05. As of December 31, 1943, the *Hawaiian* was listed for tax purposes as having a remaining value of $13,519.99, and a remaining life of one year.

Defendant does not contend that, as applied to the *Hawaiian*, the basic valuation of $56.25 per deadweight ton (plus allowances for speed) as of April 1944 found by the

War Shipping Administration in connection with the issuance of General Order No. 37 (see Finding 30) was too high.

5. Surveyors and inspectors representing both plaintiff and defendant examined the *Hawaiian*, both in drydock and afloat, at or about the time of her taking in July, 1943, and found her to be in good condition.

6. Neither at the time of her taking nor at any subsequent time during the bareboat requisition period of the *Hawaiian* was there a free market in the United States for the use of large, ocean-going, American-flag freighters because on April 18, 1942, the use of all such privately-owned vessels had been requisitioned on "time charter basis" by the War Shipping Administration. The War Shipping Administration continued to retain possession and use of substantially all such freighters from April 1942, until after March 2, 1946.

The period of Government use of a number of such freighters began even prior to the general requisitioning in April 1942. The United States Maritime Commission and its successor agency, the War Shipping Administration, had acquired the use of many such freighters by chartering them directly at various times after June 2, 1941. Those agencies had also controlled the employment of various other freighters by directions given in the course of administering the Ship Warrants Act of July 14, 1941 (55 Stat. 591). In such cases, the agencies prescribed the rates of charter hire at levels generally below current market rates. (See Finding No. 21.)

7. Worldwide changes in conditions affecting the profitability of commercial merchant shipping occurred as a result of the outbreak of war in Europe in September 1939.

Prior to the war, there had been an oversupply of shipping throughout the world and particularly in the United States. Afterwards, a worldwide shortage of vessels available for trade developed and, by the end of 1940, shipping space was hard to get. For the first time in years, capacity cargoes were available both outward and homeward.

Under such conditions, economic factors, applicable alike to water and rail carriers, caused earnings of carriers to increase in much higher proportion than the mere rate of increase in traffic, one principal cause being the fact that the costs of carriage do not increase proportionately to increases in the quantity of cargo carried per vessel or train or in the length of the haul. It follows also that an increased rate of earnings does not necessarily imply an increase in the level of tariff rates charged to shippers.

As a result of the foregoing conditions, the commercial earnings of large, American freighters rose sharply during the period 1939-41.

There is no evidence that the ocean tariff rates charged to shippers at the levels fixed by conference carriers at any time during this period exceeded rates justifiable under the conditions, although some charges being assessed in 1941, "mostly other than conference rates," were, in the opinion of the Maritime Commission, excessive.

8. None of the increased carryings of American-flag freighters during the two years following November 4, 1939, included munitions of war or other traffic to or from the combat zones in Europe because the Neutrality Act of November 4, 1939 (54 Stat. 4), excluded our merchant vessels from those zones.

Among the principal underlying causes for the increase in carryings and earnings of American freighters during this period were the following:

(a) The decrease in the effective world supply of freighters available for commercial employment as a result of such war conditions as sinkings, immobilization by blockade, delays by war damage, delays by convoy operations in combat zones, and diversion by belligerents of their own merchant vessels to military use or to use in combat areas from which our shipping was excluded by the Neutrality Act;

(b) The increase in volume of traffic available to American-flag freighters in foreign trade by the decline in com-

petition from foreign-flag freighters on routes outside the combat zones;

(c) The increased proportion of traffic producing higher freight revenues resulting from increased exports of manufactured goods from the United States after Europe was cut off as a source of supply to other world areas;

(d) The general improvement in business conditions in the United States.

9. The earnings of freighters are derived from two principal kinds of operations: (a) charter operation; and (b) berth operation. In addition, some vessels are operated by industrial carriers serving primarily their parent companies.

(a) In a charter operation, a single charterer contracts with the shipowner for the entire carrying capacity of the vessel in consideration of which the charterer agrees to pay the shipowner either a monthly rate of charter hire, as in the cases of bareboat charters and time charters, or an agreed freight per voyage, as in the case of voyage or "trip" charters. Voyage charter freight may be fixed at a stated rate per ton or other unit of cargo (a rate charter), at a stated rate per unit of the vessel's cargo space (a space charter), or at a lump sum (lump sum charter).

Under the usual bareboat charter, the charterer has full possession and operation of the vessel and pays all expenses, including upkeep.

Under the usual time charter, the shipowner retains possession and operation of the vessel and pays for her supplies, crew, repair and ordinary insurance, but the charterer pays for fuel, cargo and port expenses and also for war risk insurance on the vessel.

Under a voyage charter, the shipowner operates the vessel at his expense. The cargo and port expenses and cost of war risk insurance may be borne either by the shipowner or charterer or partially by each, depending on the terms of the charter. Under a "net form" voyage charter,

the charterer or cargo owner pays the expenses incident to the loading and discharge whereas under a "gross form," the ship pays such expenses.

If a charterer is a common carrier or if he subcharters to others, his profit is the difference between (a) the charterer's revenue from freights which he obtains from the actual shippers of cargo or from the subcharterer, and (b) the charterer's expenses which include charter hire or freight and such vessel, voyage, cargo or other expense as the terms of the charter may place on the charterer.

(b) In berth operation, the shipowner is a common carrier transporting goods for the general public at freight rates fixed in conference or other tariffs and paying all the expense of the operation. The entire earning power of the vessel is realized by the shipowner in berth operations, instead of being divided between the owner and the charterer as in charter operations, where the shipowner realizes less than the entire earning power of the ship in the interest of obtaining certainty of income.

10. Plaintiff was engaged, in the normal peacetime operations of the company, in the intercoastal trade. The earnings of plaintiff's fleet of 32 freighters in 1941 and in 1942, up to the time of their requisitioning by defendant on time charter basis, were derived from operations both in the domestic and foreign trades. In the domestic intercoastal trade plaintiff maintained a berth operation. In the foreign trade plaintiff engaged in both charter operations and berth operations with 20 of its vessels.

The earnings per deadweight ton per month (before overhead, depreciation, and taxes) realized by plaintiff from intercoastal voyages terminating in the last quarters of 1939, 1940 and 1941, are as follows:

1939	$1.29
1940	2.23
1941	3.27

Plaintiff's charter operations in foreign trade in 1941 and 1942 (other than those under certain time charters to the United States Maritime Commission) were of two kinds: (a) under 10 commercial time charters made to other private operators; and (b) under 10 space charters to the British Ministry of War Transport for voyages outward from the United States to ports in the Red Sea.

Plaintiff's berth operations in foreign trade consisted of: (a) return voyages to the United States after conclusion of the space charters to the Red Sea; and (b) three round voyages between the United States and ports in South Africa.

11. The average earnings realized by plaintiff from all voyages which commenced in 1941 and terminated in 1941 or 1942 by all plaintiff's vessels operating in foreign trade (except from voyages under charters to the Maritime Commission), were as follows:

Plaintiff's average 1941-42 earnings in foreign trade

[From Plaintiff's Exhibit 25]

	Deadweight, ton months	Profit
1. Time charters (11 voyages)	650,796.57	$3,144,473.61
2. Space charters outward and berth voyages homeward (10 voyages)	547,128.69	3,106,878.53
3. Berth voyages to South Africa (3 voyages)	132,762.67	573,455.02
Total	1,330,687.93	6,824,807.16

Average profit per deadweight ton per month from all plaintiff's foreign trade voyages in 1941-42

(Before overhead, depreciation and taxes)

$$\frac{\$6,824,807.16}{1,330,687.93}=5.13$$

(After overhead and before depreciation and taxes)

$$\frac{\$6,824,807.16—\$240,480.00}{1,330,687.93}=\$4.95$$

Appendix to Petition.

The average earnings realized by plaintiff from 14 voyages under time charters with the Maritime Commission, with the first voyage beginning on October 17, 1941, and the last terminating on October 12, 1942, were $2.54 per deadweight ton per month, before overhead, depreciation, and taxes.

The average profit per deadweight ton per month from all plaintiff's foreign trade voyages in 1941-1942, including those under charters to the Maritime Commission, was, before overhead, depreciation, and taxes:

$$\frac{\$8,761,612.69}{2,093,147.93} = \$4.19$$

12. The earnings realized by plaintiff's vessels were typical of the earnings being realized in foreign trade by large American freighters generally during the period preceding the general requisitioning in 1942 (See Findings Nos. 13, 14, 15, and 16), such earnings reaching peak levels in June 1941, and thereafter declining, as the result of the passage of the Ship Warrants Act. Although the evidence establishes that levels of earnings did decline somewhat from peak levels of June 1941, the amount thereof cannot be determined with reasonable accuracy from the record.

13. Illustrative of the earnings then available in foreign berth operations were the earnings of three American freighters of the Hog Island type, which States Marine Corporation bought in late 1940 or early 1941.

Before the outbreak of war in Europe in September 1939, States Marine Corporation operated entirely with chartered foreign-flag vessels. The number of charters which they made per year averaged about 300. An average of 40 time chartered vessels was used to maintain about twelve berth services from the United States to Europe, South Africa and Japan. In addition, the company engaged in numerous full cargo trades and acted as agents for others.

As a result of the scarcity of foreign-flag vessels in 1940, the company began chartering American-flag vessels and

also purchased the three Hog Island vessels in question. Until they were requisitioned on time charter basis in 1942, these three vessels were employed on 23 voyages in the company's berth service between the United States and South Africa. The first voyage began on October 30, 1940, and the last voyage terminated on May 13, 1942. The average profit of the three vessels while so operated amounted to $4.92 per deadweight ton per month (apparently before overhead, depreciation and taxes).

14. The profitability of American freighters in charter or "tramp" operations in foreign trade during 1940-42 is shown by the earnings of two Hog Island vessels, the *Ann Skakel* and the *Patricia Skakel,* purchased in December 1940 and January 1941, respectively, by subsidiaries of Parry Shipping Company, Inc., of New York. Operating under various forms of charter, the vessels loaded or discharged cargoes in the United States, the Far East, India, South America, Canada, and West Africa.

From the voyages of the *Ann Skakel* completed within the company's fisal year ending October 31, 1941, her earnings were $4.22 per deadweight ton per month before depreciation, overhead, and Federal income taxes. From the voyages of the *Ann Skakel* completed within the company's fiscal year ending October 31, 1942 and prior to requisitioning of the vessel by the War Shipping Administration on May 8, 1942, her earnings were $2.94 per deadweight ton per month before overhead, depreciation, and Federal income taxes. The average earnings of the vessel from the time of its purchase in December 1940 until its requisition by the War Shipping Administration on May 8, 1942 were $3.79 per deadweight ton per month before overhead, depreciation, and Federal incomes taxes.

The first voyage of the *Patricia Skakel* consisted of a space charter from New York to Vladivostok, a voyage charter for a cargo of sugar from Java to Ceylon and a voyage charter with a cargo of ore from India to Baltimore occupying 176 days from the beginning of loading in New

York on January 29, 1941. From that round voyage the vessel's gross revenue was $492,368.33 and her net profit, $298,546.98, equivalent to $6.36 per deadweight ton per month, before overhead, depreciation, and Federal income taxes.

From the remaining voyages of the *Patrica Skakel,* commencing in July 1941 and occupying about 384 days, average earnings amounting to $3.27 per deadweight ton per month, before overhead, depreciation and Federal income taxes, were realized by her owner. The average profit realized by her owner from the entire operation up to September 19, 1942, when defendant requisitioned title to the *Patrica Skakel,* amounted to $4.25 per deadweight ton per month, before overhead, depreciation, and Federal income taxes.

15. A compilation prepared by certified public accountants from voyage reports submitted to the Maritime Commission by various shipping companies with respect to the earnings of American freighters built before 1939 and of 7,000 deadweight tons and over, on voyages terminating in the last quarter of 1941 or early 1942, show the following:

(a) Owned vessels operated by owner:

On 68 foreign overseas voyages, the average operating profit (before depreciation and overhead) amounted to $5.50 per deadweight ton per month. On 49 foreign nearby voyages, the average operating profit (before depreciation and overhead) was $3.55 per deadweight ton per month. On 55 domestic voyages, the average operating profit (before depreciation and overhead) was $2.64 per deadweight ton per month. The average operating profit (before depreciation and overhead) on all domestic and foreign voyages was $4.41 per deadweight ton per month.

(b) Owned vessels time chartered to others:

On 17 foreign overseas voyages, the owner's average profit (before depreciation and overhead) was $4.44 per

deadweight ton per month. On 2 foreign nearby voyages, the owner's average profit (before depreciation and overhead) amounted to $4.73 per deadweight ton per month. There were no reports of domestic voyages in this class. The owner's average profit (before depreciation and overhead) on all foreign voyages was $4.45 per deadweight ton per month.

(c) Vessels bareboat chartered from others:

These vessels were all owned by the Maritime Commission. On 46 foreign overseas voyages, the charterers' average direct operating profit before the payment of bareboat hire amounted to $4.88 per deadweight ton per month, and after the payment of bareboat hire averaging $2.21 per deadweight ton per month, the charterers' average net profit was $2.67 per deadweight ton per month. There were no reports of foreign nearby voyages in this class, and only 1 domestic voyage.

The foregoing data reflected the results of voyages terminating in the last quarter of 1941 or early 1942, under charters or arrangements made prior to that time.

The foregoing data indicate that the Maritime Commission was, some time prior to the general requisitioning in April 1942, collecting bareboat hire at a rate in excess of the amount ($1.00 per deadweight ton per month) which the War Shipping Administration later proposed to include (see finding 24) in its computation of requisition time charter hire as "bareboat" compensation to owners of requisitioned freighters.

16. Until after the Ship Warrants Act became effective on July 14, 1941, time charter rates of $7.50 per deadweight ton per month were the prevailing rate. Such a rate would yield a "bareboat" return or equivalent of $5.61 per deadweight ton per month (after overhead but before depreciation and taxes) after deducting the actual average vessel and voyage expenses (plus overhead) of $1.89 per deadweight ton per month incurred by plaintiff's vessels while

engaged on 11 voyages under time charters during the period from February 2, 1941 to April 17, 1942.

17. The evidence does not establish that the level of earnings realized by shipowners from the use of freighters such as the *Hawaiian* for the carriage of commercial cargo some months prior to the general requisitioning of all such privately owned vessels in April 1942 could reasonably have been realized by the plaintiff throughout the bareboat requisition period if the *Hawaiian* had not been requisitioned by defendant, but had remained in plaintiff's possession and control.

Economic conditions of demand for and supply of shipping space, which had materially contributed to or brought about the level of earnings realized by shipowners in 1941 from the commercial employment of large, American-flag freighters such as the *Hawaiian,* throughout the bareboat requisition period remained favorable to a continuance of the potential level of earnings of such freighters from commercial employment at or above 1941 levels.

Other factors and circumstances which materially affected the level of earnings realizable from the commercial employment of large, American-flag freighters such as the *Hawaiian* came into being prior to the general requisitioning in April of 1942, on time charter basis, of all such privately owned vessels. On July 14, 1941, the Ship Warrants Act, 55 Stat. 591, was passed. (See finding 21.) After the passage of this Act, there was a substantial decline in the level of earnings realizable from the use of freighters such as the *Hawaiian.* Perhaps as importantly, from the standpoint of impact upon the earnings realizable from the commercial employment of all large, American-flag freighters, this country entered World War II on December 8, 1941.

Thereafter, the level of earnings previously realizable from the employment of large, American-flag freighters such as the *Hawaiian* for the carriage of commercial cargo (see findings 7-16) no longer existed. Although the record

does not establish with great particularity the full extent of restrictions nor the exact amount of reduction in earnings brought about by war conditions, it sufficiently appears from the record that a vessel would have been unable to operate under unrestricted free-market conditions during the bareboat requisition period, not only because of legislative and administrative regulations, restrictions, and controls, but also by reason of historic circumstances and conditions arising from this country's entry into the war.

Convoy protection, with its incident delays, was required in substantially all, if not all, trades. Priorities on steel for repairs and on scarce fuel oil were essential for continued operation of a vessel. It would have been impossible for a privately owned ship to operate in a service geared to securing for its owner the highest revenues, and at the same time to obtain the necessary priorities and protection from the Government. Under all the facts and circumstances of record or of which the court may take judicial notice, the market value of the use of the *Hawaiian* during the period prior to her requisition by the defendant on time charter basis in 1942 does not establish the fair and reasonable value of her use on bareboat basis throughout the period of defendant's requisition of her use on such basis from July 7, 1943, to May 1, 1946.

18. After the Ship Warrants Act became effective and after the entry of this country into World War II, it became progressively impossible, because of war conditions and because of measures taken by the War Shipping Administration and the Maritime Commission pursuant to the Act, for American shippers to operate without acceptance of the Government's schedule of rates, with the consequence that such rates came to be accepted by a substantial majority of such shippers.

19. The charter rates promulgated from time to time by the United States Maritime Commission and the War Shipping Administration in the course of administering the Ship

Warrants Act of July 14, 1941, and the subsequent requisition programs were not market rates nor equivalent to probable fair market rates.

20. The so-called Ship Warrants Act of July 14, 1941, authorized the United States Maritime Commission and its successor, the Administrator, War Shipping Administration, to prescribe certain conditions to be complied with by such shipowners or charterers as might undertake to do so as a condition of obtaining a license called a "ship warrant" entitling their vessels to priority in "the use of facilities for loading, discharging, lighterage or storage of cargoes, the procurement of bunker fuel or coal, and the towing, overhauling, drydocking or repair of such vessels" in ports under jurisdiction of the United States. Among the conditions so authorized to be prescribed was an undertaking "with respect to * * * the fair and reasonable maximum rate of charter hire or equivalent." The policy required to be followed by the Commission in the administration of the Act was "to make fair and reasonable provision for priorities with respect to" the importation and transportation of substantial quantities of materials described in Section 4 of the Act.

The schedules of rates of charter hire and other conditions prescribed by the Maritime Commission or its successor from time to time, as hereinafter set forth, in the course of administering the Ship Warrants Act were incorporated in written "Uniform Conditions." A ship warrant would not be issued to an applicant who did not undertake to observe such "Uniform Conditions."

Although plaintiff did apply to the Commission on September 25, 1941, and on October 3, 1941, for ship warrants for its vessels, plaintiff did not incorporate in its application an undertaking to observe the "Uniform Conditions." The Commission declined to issue warrants and returned the application to the plaintiff.

21. The measures taken by the United States Maritime Commission or its successor, War Shipping Administration,

in the course of administering the Ship Warrants Act of July 14, 1941, included the following:

(a) On July 30, 1941, in Press Release 970, the Commission issued "a scale of maximum time charter rates for United States and foreign flag vessels in which the Commission will concur for charters in which their concurrence is indicated on and after August 1, 1941."

Such scale provided for basic time charter hire at the rate of $4.50 per deadweight ton per month for steamships of 10,000 deadweight tons and up, with an additional 10¢ for each ½ knot of speed in excess of 12 knots. The basic rates for steamers of lesser deadweight tonnage were somewhat higher, the rate for a steamer of the *Hawaiian's* tonnage being $4.60 per deadweight ton per month. Such rates were admittedly about 35% below the then existing time charter rate of $7.50. Berth and other rates were to be adjusted on or before September 1, 1941, to conform to time charter rates.

(b) The schedule of time charter rates contained in Press Release 970 formally became part of the ship warrants procedure by its incorporation into the "Uniform Conditions" issued in connection with the "Ship Warrants Rules and Regulations," dated August 14, 1941, and approved by the President, August 26, 1941, to become effective thirty days thereafter.

(c) On January 5, 1942, the Commission issued its Press Release 1117 making public the Commission's General Order No. 49, dated December 30, 1941, and to be effective January 20, 1942, reducing the maximum time charter rates which warrant-holding vessels were required to observe to levels about 28% below those in Press Release 970.

The new basic maximum time charter rate on steamers of 10,000 deadweight tons and up was $3.25 per deadweight ton per month, compared with the rate of $4.50 prescribed by Press Release 970. An additional 10¢ per deadweight ton per month was allowed for each knot of speed in excess

of 10 knots up to 14 knots. For steamers of the *Hawaiian's* tonnage, the new basic maximum rate was $3.35 per deadweight ton per month, as compared with the previous maximum of $4.60. After speed adjustments, the new rate for a steamer like the *Hawaiian* would have been $3.55, as compared with the previous maximum rate of $4.60 under Press Release 970.

(d) Berth rates and certain other rates charged by the operators of warrant-holding vessels were also required by General Order No. 49 and Press Release 1117 to be so adjusted as not to be "in excess of the charges for such service or arrangements in effect September 1, 1940 * * * plus such reasonable additional surcharge as may be approved by the Commission" to cover increases in operating expense subsequent to September 1, 1940, and such requirement was incorporated into the ship warrant procedure by means of revised "Uniform Conditions" issued January 13, 1942.

Surcharges on berth rates were, in fact, authorized by "rate orders" of the War Shipping Administration issued throughout the period 1942-46 until the Warrant Act Regulations were revoked in 1946.

(e) In cooperation with the War Shipping Administration, the American Institute of Marine Underwriters and British Underwriters adopted a special provision called a "Ship Warrant Warranty," to be inserted in ship hull insurance policies issued on and after February 20, 1942 making the holding of a ship warrant a condition of the validity of the insurance.

(f) After February 2, 1943, "nonwarrant holding vessels" were forbidden to use a "facility" without special authorization obtained by application to the War Shipping Administration. Such special authorizations were issued infrequently. The effect was to prohibit such vessels from obtaining repairs, fuel, stevedoring and towage in United States ports, even though the furnishing of such services would not interfere with service to a warrant holding vessel.

Before the "Ship Warrant Warranty" device was brought into operation and, later, all use of shore facilities was denied to vessels not holding warrants, the Warrants Act had been ineffective to compel operators to obtain warrants merely because of the priority accorded to warrant-holding vessels in the use of shore facilities.

22. Prior to the general requisitioning in April 1942, many shipowners protested against the schedules of rates prescribed for warrant-holding vessels. There were few, if any, unqualified acceptances of the P. R. 1117 scale of rates. As a result, readjustments were allowed by the War Shipping Administration by means of "escalator clauses" and by giving the subsequent time charter requisition rates retroactive effect to January 20, 1942.

23. Following the general requisition on time charter basis in April 1942, the War Shipping Administration on May 14, 1942, issued its General Order No. 8, establishing a scale of requisition time charter rates at amounts intermediate between those in the Maritime Commission's Press Release 970 of July 30, 1941, and those in the Commission's Press Release 1117 effective January 20, 1942. The new scale was made retrocative to January 20, 1942.

Under the General Order 8 scale, steamers of 10,000 deadweight tons and up received time charter hire at $3.75 per deadweight ton per month on sailings prior to May 16, 1942, and at $4 on sailing on and after May 16, 1942. Under Press Release 970 the basic rate for such vessels was $4.50 (see Finding 21a), whereas, under Press Release 1117, the rate was $3.25 (see Finding 21c).

Steamers of the *Hawaiian's* tonnage were allowed, under General Order 8, a basic rate of $3.90 on sailings prior to May 16th and $4.15 on later sailings.

24. Before issuing General Order No. 8 on May 14, 1942, the War Shipping Administration made an investigation

of the average cost of operating various classes of vessels, including vessels built before 1937. In connection with its investigation the War Shipping Administration had requested and received from owners reports showing the financial results of some 597 voyages terminating for the most part in the last quarter of 1941, and in a few instances, in early 1942.

The War Shipping Administration approached the question of a requisition time charter rate scale from the standpoint of the sum of two components: (a) a so-called "bareboat" factor of $1.00 per deadweight ton per month (with certain premiums for speed, refrigeration, and an "off-hire" allowance of 10%); and (b) a factor to represent the average of shipowners' expenses under the proposed form of requisition time charter, together with an allowance for owner's overhead.

(a) the "bareboat" factor of $1.00 per deadweight ton per month was not based upon any approximation of the earnings realized by shipowners from commercial employment of their vessels as shown by the voyage reports above mentioned, indicating such earnings from voyages terminating in the last quarter of 1941 or early 1942. The requisition time charter rates as contained in General Order No. 8 had no relation to the 1941 commercial earnings or the 1941 value of the use of requisitioned vessels. The former Director of Fiscal Affairs of the War Shipping Administration testified at a hearing in this case that "we got together a lot of information and we thought that the best way to fix the rate was to fix it on as low a basis as we possibly could. * * * We know that in 1941 the ships were earning quite a lot of money, and that the rates that were published in General Order No. 8 were nowhere near as high as the earnings the companies were making in 1941."

(b) The expense factor was compiled from statistics on the average vessel expense, from voyages terminating in the last quarter of 1941 or early 1942, for crew's wages,

subsistence of crew, stores, supplies, equipment, repairs, other vessel maintenance expense and insurance, with an allowance for owner's overhead of $100 per day, which was later changed to $125 per day. The resulting figures were adjusted to take into account certain known or anticipated increases in costs and for periods of "off-hire."

The principal study of actual vessel expense related to 60 voyages terminating in the last quarter of 1941 by freighters over 20 years old and having from 8,000 to 8,999 tons deadweight capacity, as this was the largest number of voyages in any one class.

To determine the rates applicable to vessels in tonnage classes below and above the 8,000 to 8,999-ton class, additions or subtractions were made to adjust for assumed differences in average vessel operating costs on a deadweight ton basis.

The vessel expenses and overhead shown by the studies fluctuated so widely and would, therefore, cause such wide variations in compensation to owners under a time form operation that the Director of Fiscal Affairs recommended that the War Shipping Administration substitute a bareboat basis of operation. This recommendation was not followed at that time, however, but was in 1943.

25. Prior to the issuance of General Order No. 8 on May 14, 1942, the question of requisition time charter rates was discussed at a meeting held May 9-11, 1942, between representatives of the War Shipping Administration and a Group of officials (for convenience, hereinafter called the "owner group") representing a number of shipping companies. Among those in attendance were representatives of seven companies holding operating differential subsidy contracts with the Maritime Commission, and of two companies which were subsidiaries of steel companies. Plaintiff was represented at this meeting.

At the meeting, representatives of the War Shipping Administration started discussions with the owner group on

the basis of a "bareboat" component of $1.00 per deadweight ton per month. The owner group was given to understand by the Director of Fiscal Affairs that if there was not general acceptance of "a rate that I thought was low enough," he would recommend requisition of title to their vessels.

The owner group declined to discuss rates composed of stated component parts, and the rate finally arrived at was understood to be an "overall rate." However, owner's costs under time charter form of operation of freighters in the 8,000 to 8,999-ton class were discussed between a subcommittee of the owner group and the Comptroller of the War Shipping Administration and various adjustments were made (see finding 24) to arrive at a total proposed rate of $4.10 per deadweight ton per month for freighters in the 8,000 to 8,999-ton class on sailings after May 16, 1942.

Finally, after some of the owner group had indicated that they would recommend acceptance if 25 cents per deadweight ton per month were added to bring the rate as a whole to $4.35, the rate was increased to $4.35. The evidence does not furnish any clear explanation as to the calculation of the rates of hire applying to vessels having tonnages greater or less than those in the 8,000 to 8,999-ton group, but the rate applicable to vessels of the *Hawaiian's* tonnage on sailings after May 16, 1942, was $4.15. On account of the *Hawaiian's* speed (in excess of 12 knots), she was entitled to $4.35.

It does not appear from the evidence that plaintiff's representatives were included in that portion of the owner group which had agreed to recommend acceptance if the 25 cents were added to the $4.10 rate. One of plaintiff's officials in attendance stated to the meeting that he was reasonably sure plaintiff would not accept. The time charter rates promulgated in General Order No. 8 were ultimately accepted by plaintiff.

26. The evidence in the record establishes that 79 owners of 390 vessels accepted defendant's time charter rates, including plaintiff.

As stated in the preceding finding, the owner group was advised at the May 1942 meeting that if there were not general acceptance of "a rate that I thought was low enough," the Director of Fiscal Affairs would recommend requisition of title to their vessels. One of the owner group present at the meeting declined to accept the time charter rates, and his vessels were later requisitioned for title. Under these circumstances, practical considerations with regard to the shipowner's organization and post-requisition prospects weighed in favor of acceptance of the time charter rates.

Some shipowners had incurred expenses from operating vessels on requisition status or on unexecuted time charter status from dates as far back as January 1942. Acceptance of the time charter rates promulgated in General Order No. 8, or, in the alternative, acceptance of 75 per cent of "just compensation" as determined by the War Shipping Administration with the right to have the amount of just compensation judicially determined, was necessary in order to obtain reimbursement for these expenses. In plaintiff's case, such unreimbursed outlays amounted to about $2,000,000 at the time when the requisition time charter rates were tendered for acceptance.

Time charters were not accepted by all affected owners, and the evidence establishes that many of the charters which were accepted were accepted at a much later date, in connection with settlements by transfer of title or otherwise.

27. In November 1942, a dispute occurred between the Comptroller General of the United States and the Administrator, War Shipping Administration, regarding the application of the so-called "enhancement clause" of Section 902 (a) of the Merchant Marine Act, 1936, to the determination of just compensation for requisitioned vessels. The Comptroller General ruled that the "enhancement clause" prohibited the payment of compensation for vessels to the extent that it might be based upon values in excess of the values existing on September 8, 1939, provided such excess be determined as due to economic conditions directly caused

by the national emergency. As a result of a notice issued December 17, 1942, the Administrator commenced to withhold 25% of the hire payable under the terms of the requisition time charters. Thereafter, the *Hawaiian* was requisitioned on bareboat basis (See Finding No. 1), and similar requisitions of plaintiff's other vessels followed.

On October 15, 1943, the President appointed an Advisory Board on Just Compensation, which on December 7, 1943, rendered a report of its views on the principles which should be followed by the Administrator in determining just compensation.

Meanwhile, by notices dated October 15, 1943, November 1, 1943, and November 24, 1943, the Administrator instituted a "Revised Program of Ship Requisition, Charter and Operation," which, in effect, provided for termination of the requisition time charters then remaining in force and for a general requisition on boreboat basis. Exception was made for cases where owners might elect to remain on time charter basis but with a revised form of charter and at revised rates.

Thereafter, the compensation offered by the War Shipping Administration for the use of vessels requisitioned on bareboat basis was fixed by General Order No. 37, issued on April 7, 1944.

28. General Order No. 37 was prepared by the Division of Large Vessel Procurement of the Was Shipping Administration under the supervision of the Assistant Deputy Administrator for Fiscal Affairs. The basic rate of bareboat charter hire provided by General Order No. 37 for all dry cargo vessels built during the period 1914-34 was $1.25 per deadweight ton per month.

In a memorandum submitted on April 15, 1944, to the House Committee on the Merchant Marine and Fisheries, the Administrator, War Shipping Administration, stated that "the proposed basic rates of General Order No. 37 are:

(1) below actual earnings of 1940 and not greatly in excess of earnings of 1939;

(2) only about 40 percent of the rate recently fixed by the court in the *Olson case;*

(3) only about 40 percent of the bareboat rates paid by the Army and Navy in 1941;

(4) less than one-third of the rate fixed administratively in the first [world] war;

(5) about one-third of the actual earnings of 1941;

(6) about one-fifth of the rates allowed by the courts in the first [world] war; and

(7) less than the average bareboat rates charged by the Maritime Commission in 1940 and 1941."

The principal preliminary findings in connection with determination of the rate of bareboat charter hire for freighters built prior to 1935 were that the market value of their bareboat use could not be determined by sufficient hirings made at or about the time of taking, and that the value of the use should be determined in accordance with Rule 3 of the Advisory Board on Just Compensation, which provided as follows:

> Where market value cannot be determined by sufficient sales, or hirings of vessels of like character, made at or about the time of taking, it is to be determined by the Administrator from a consideration of cost of construction, acquisition cost so far as relevant, improvements, replacement costs, depreciation, earnings, physical condition, appraisals for insurance or other purposes, and any other relevant facts upon which a reasonable judgment as to value can be based. These various matters are to be given such weight by the Administrator, as in his opinion they are justly entitled to, in determining the price that

would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy.

The method used by the War Shipping Administration was to give predominant consideration to two "factors", each of which, it was found, showed that an amount of about $1.25 per deadweight ton per month would constitute just compensation for bareboat use. The two "factors" were:

(a) The average amount of "adjusted earnings under current charters", (i. e., under the requisition time charters) and, alternatively;

(b) A sum sufficient to provide for (1) annual "depreciation" on the valuation of the vessels, and (2) a "reasonable rate of return" on such valuation.

Further facts regarding these two alternative factors and the subsidiary findings of the War Shipping Administration in connection with those factors are stated in findings 29, 30, and 31.

29. In connection with the first factor, it was found that the "adjusted earnings" of the average dry cargo vessel built prior to 1935 had amounted to $1.275 per deadweight ton per month under the requisition time charters.

The procedure of using as a factor in determining just compensation for use under the bareboat requisitions the average "adjusted earnings" under the scale of rates fixed by the War Shipping Administration in connection with its prior requisition on time charter basis was explained on the ground that the requisition time charters were the only "hirings" immediately before the general requisition on bareboat basis.

Some consideration but no effect was given to the earnings which requisitioned vessels had realized for their owners prior to defendant's taking of the vessels in April 1942, the reasons given being, in substance, that such earnings were considered to be no longer available to private

shipowners and that time charter rates had been decreasing for some time prior to the general requisitioning on time charter basis in April 1942.

Earnings then being realized by defendant on particular voyages from the employment of requisitioned vessels for the carriage of commercial cargo were not taken into account by the War Shipping Administration in determining just compensation for the use on bareboat basis of requisitioned vessels. Vessels requisitioned by the War Shipping Administration were used for the carriage of military, lend-lease, and commercial cargoes. The evidence does not establish that it was possible for the War Shipping Administration to segregate the results of voyages in which requisitioned vessels were used for the transportation of commercial cargo, as distinguished from voyages in which military or lend-lease cargoes, or combinations of types of cargoes, were carried. The primary consideration in the employment of requisitioned vessels by the War Shipping Administration was the effective utilization of such vessels as a pool of shipping in the interests of furthering the war effort. Vessels were necessarily used uneconomically in many instances, while in other instances vessels were placed in trades where there was an opportunity for profit. The evidence does not establish that earnings realized on particular voyages by defendant from the employment of requisitioned vessels for the carriage of commercial cargo bear any reasonable relationship to just compensation for the use on bareboat basis of requisitioned vessels.

The statement of "adjusted earnings" of the average dry cargo vessel built prior to 1935 consisted in part of deductions of estimated amounts for "deferred repairs", "allowance for risks", and "overhead", which defendant's witness on the subject was unable to substantiate and which are not shown to have any material application to the *Hawaiian*.

A comparison of the actual audited figures of the plaintiff and of States Marine Corporation for all their operations

under the requisition time charters, and the War Shipping Administration figures shows the following result:

Comparison of W. S. A. estimate of "adjusted earnings" under requisition time charters with actual earnings of plaintiff and of States Marine Corporation.

Items		W. S. A. estimate (Def. Ex. 19B)	Plaintiff (Pl. Ex. 68)	States Marine (Pl. Ex. 73)
1. Actual charter hire		$4.098		
2. Allowance for accrued off hire		.066		
3. Adjusted charter hire		4.032	$3.96	$4.30
4. Reported operating costs	$1.882			
5. Allowance for deferred repairs	.215			
6. Allowance for risks	.250			
7. Adjusted operating costs		2.347	1.89	*1.93
8. Adjusted earnings before overhead		1.685	2.07	2.37
9. Allowance for overhead		.41	**.17	†0
10. Adjusted earnings		1.275	1.90	#2.37

* Includes $45,343.71 of disputed items of expense equivalent to $0.09 per deadweight ton per month.

** At $60 per day, being the husbanding fee allowed by the W. S. A. to General Agents.

† Husbanding expense is included in operating costs. (*McGrath*, p. 1898.)

The actual figure in Plaintiff's Exhibit 73 is $2.40. The figure of $2.37 appearing in the above table is derived from use of months of 30 days each for convenience in calculating the number of "deadweight ton months."

30. In connection with the second alternative "factor" claimed to support the rate of $1.25, three subsidiary "findings" were made by the War Shipping Administration staff:

(a) That the average valuation of requisitioned dry-cargo freighters built prior to 1935 amounted to $75 per deadweight ton as of April 1942 when the general requisitioning on time charter basis had occurred;

(b) That the average anticipated remaining life of such vessels after April 1942 was eight years and their consequent annual rate of "depreciation" was 12½%.

(c) That annual hire at the rate of $15 per deadweight ton (equivalent to $1.25 per deadweight ton per month), would provide both: (i) "a reasonable rate of return" of $5.625, representing 10% of $56.25, the average depreciated valuation of the vessels per deadweight ton as of April 1944; and also, (ii) $9.375, representing the amount of annual depreciation on the average value of $75 (as of April 1942), at the annual rate of 12½%.

(a) With regard to the subsidiary findings that requisitioned freighters built prior to 1935 all had a value of $75 per deadweight ton in April 1942 and that the depreciated value of such freighters in April 1944 was $56.25 per deadweight ton, "the most reliable measure of evaluation" was, in the opinion of the War Shipping Administration, "the value as of the date of general requisitioning in April 1942, depreciated to the date of said determination."

No factual justification appeared for lumping all such vessels together and assigning them the same valuation. On the contrary, the Administration's Division of Statistics and Research found, in respect of the sales and appraisal data studied covering dry cargo vessels of 7,000 to 12,000 tons deadweight, that:

> Any trends or central tendencies noted in this study are qualified by the fact that the number of dry cargo vessels and tankers under consideration is small, probably too small for statistical analysis. Furthermore, vessels of the size included here are quite individualistic in character and would show a high degree of dispersion from any median or average. The best that the data have to offer are some suggestions and tentative conclusions.

Eight "elements" were stated to have been considered in arriving at the April 1942 valuation finding. Of these, two "elements" relating to depreciated construction cost were given little weight. The significance of an "element" consisting of two private sales occurring in January and February 1941, and another "element" consisting of a "peak sale," also in 1941, was unexplained. Little, if any, weight was given to the "element" of average sales in 1941 from the Government's laid-up fleet. The "element" of appraisal data showing values of $76 in 1942 and $70 in 1943 consisted of some 18 appraisals in March, April, and May 1942, of which 15 were by the Maritime Commission, and three private appraisals in 1943.

The final "element" consisted of "values under current charters," which were found to be from $70 to $75 per deadweight ton. This figure was the valuation which the assumed average vessel would have under the scale fixed by the War Shipping Administration in General Order No. 9 for purposes of war risk insurance under the requisition time charters. After a consideration and weighing of all of the above "elements", the figure adopted by the War Shipping Administration was a valuation of $75 per deadweight ton.

(b) The second subsidiary finding above mentioned was that because of assumed obsolescence, such vessels had a useful remaining life of eight years and a consequent annual "depreciation" of 12½ per cent commencing in April 1942. "Depreciation" was not used in the usual accounting sense but as a measure of a wasting asset approaching the end of its useful life, because of the judgment of the War Shipping Administration that subsequent to the war and immediate post-war periods old vessels would be unable to compete commercially with newer vessels, and that the value of old vessels, except for scrap purposes, would probably be exhausted during the anticipated war and immediate post-war periods.

(c) The third subsidiary finding, that a 10 per cent rate of return on the War Shipping Administration's valuation of the vessels as of April 1944 was a "reasonable rate of return," was based upon the exercise of the judgement of the War Shipping Administration's staff. It was founded, in part, upon the "personal judgment as a business man" of the Assistant Deputy Administrator for Fiscal affairs, and in part upon the judgment of the War Shipping Administration's staff "of what public opinion would consider a reasonable rate of return."

31. It is not possible to conclude from the evidence that the rate of $1.25 per deadweight ton per month was the rate which would probably result from fair negotiations between an owner willing to let and a charterer willing to hire the *Hawaiian* on or about July 7, 1943, or at any other time during her requisition period.

32. The fair and reasonable value of the use of the *Hawaiian* during the period of bareboat requisition is not capable of measurement with mathematical exactness. From a consideration and evaluation of all of the relevant facts and circumstances of record or of which the court may take judicial notice, including, but not limited to, the general characteristics of the *Hawaiian*, her physical condition, her age, the level of earnings realized by owner from the use of vessels both prior to requisition and under requisition time charter, the demand for and supply of shipping space, the legislative and administrative restrictions to which vessels were subject, and considering the uncertainties caused by this country's participation in World War II, it is found that a bareboat rate of $2.50 per deadweight ton per month during the bareboat requisition period constitutes just compensation for the use of the *Hawaiian*, which does not include any enhancement caused (1) by the Government's need of vessels which necessitated the taking, (2) by the previous taking of vessels of similar types, or (3) by a prospective taking reasonably probable.

CONCLUSION OF LAW.

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover.

The entry of judgment is suspended until the incoming of a stipulation by the parties, or, in the absence thereof, until the incoming of a report of a Commissioner showing the amount due plaintiff, computed in accordance with this opinion.

ORDER OF THE COURT ENTERING JUDGMENT.

(Caption Omitted.)

ORDER.

On October 5, 1954, the court held that plaintiff was entitled to recover but suspended the entry of judgment pending either the filing of a stipulation by the parties or a report by the Commissioner of the court showing the amount due plaintiff computed in accordance with the court's decision.

On February 28, 1955 and March 14, 1955, reports were filed by the Commissioner showing that the sum due plaintiff in accordance with the court's decision is $492,607, together with interest at the rate of 4% per annum, not as interest but as part of just compensation.

Said interest is to be computed on the unpaid balances of each monthly installment from the dates when currently due until the date of payment of judgment or, if previously paid, until paid. As of this date, there is found to be due plaintiff the sum of $204,220.71 so computed with further interest to be computed at the rate of $53.9843 per day until date of payment of judgment.

NOW, THEREFORE, IT IS ORDERED this sixteenth day of March, 1955, that judgment be and hereby is entered for

plaintiff in the sum of four hundred ninety-two thousand six hundred seven dollars ($492,607) together with interest at the rate of four percent (4%) per annum on arrearages, not as interest but as part of just compensation, in the sum of two hundred four thousand two hundred twenty dollars and seventy-one cents ($204,220.71) as of this date with further interest until date of payment to be computed at the rate of $53.9843 per day.

By the Court,

MARVIN JONES,
Chief Judge.

DEFENDANT'S MOTION FOR REHEARING.

On March 25, 1955, defendant filed a motion for a rehearing.

On May 3, 1955, the court entered the following order on said motion:

ORDER

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 or 54 of the rules of this court and, on consideration thereof,

IT IS ORDERED this third day of May, 1955, that said motions be and the same are overruled as follows:

* * * * * *

48758 American-Hawaiian Steamship Company, as Owner of the American Steamship *Hawaiian*, Defendant's motion.

* * * * * *

By the Court

/s/ MARVIN JONES
MARVIN JONES
Chief Judge.

PART II.

TEXT OF STATUTES INVOLVED.

The Merchant Marine Act, 1936, as amended, (46 U. S. C. 1242, 49 Stat. 2015, 53 Stat. 1254), contains the following provisions regarding the requisitioning of ships:

"SEC. 902. (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President,* it shall be lawful for the Commission** to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the

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* An "unlimited national emergency" was proclaimed by the President on May 27, 1941 (55 Stat. 1647).

** By Executive Order No. 9054 issued February 7, 1942 (7 Fed. Reg. 837), the President established the War Shipping Administration, under the direction of an Administrator, and transferred to the Administrator various functions of the United States Maritime Commission, including its powers under Sec. 902 of the Merchant Marine Act and under the Ship Warrants Act.

owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

[Section 902 (b) is omitted because it is applicable only to vessels upon which a construction-differential subsidy has been allowed and paid. None of the petitioner's vessels were constructed with the aid of a construction-differential subsidy from the government.]

'(c) If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, the Commission, at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property and for the services required under the terms of such charter. If such person does not execute and deliver such charter and accept such rate of hire, the Commission shall pay to such person on account of just compensation a sum equal to 75 per centum of such rate of hire as the same may from time to time be due under the terms of the charter so tendered, and such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use. In the event of loss or damage to such property, due to operation of a risk

assumed by the United States under the terms of a charter prescribed in this subsection, but no valuation of such vessel or other property or mode of compensation has been agreed to, the United States shall pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U. S. C., 1934 edition, title 28, secs. 41, 250).

• • • • • •

The "Ship Warrants Act," (Act of July 14, 1941; P. L. 173, 77th Congress; 55 Stat. 591; 50 War App. U. S. C. Secs. 1281-1286):

AN ACT

To Provide for Priorities in Transportation by Merchant Vessels in the Interests of National Defense and for Other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That during the emergency declared by the President on May 27, 1941, to exist, but not after June 30,

1943,* the President may, notwithstanding any other provisions of law, whenever he deems it in the interest of national defense, including the maintenance of essential supplies and services, authorize the United States Maritime Commission to issue warrants as hereinafter provided with respect to any vessel documented under the laws of the United States or any vessel not so documented but owned by a citizen of the United States. Such warrants may also be issued to foreign-flag vessels not owned by citizens of the United States upon application therefor by the owner of said vessel or the charterer thereof on behalf of such owner. Such application shall be in such form as the United States Maritime Commission may prescribe. All warrants shall be issued and may be revoked pursuant to regulations issued by the United States Maritime Commission with the approval of the President.

SEC. 2. The warrants to be issued pursuant to this Act shall be in such form as the Maritime Commission shall prescribe, and shall set forth the conditions to be complied with by the affected vessel as a condition to receiving the priorities and other advantages provided in this Act by reference to an undertaking of the owner or charterer with respect to the trades in which such vessel shall be employed, the voyages which it shall undertake, the class or classes of cargo or passengers to be carried, *the fair and reasonable maximum rate of charter-hire or equivalent*,** and such incidental and supplementary matters as appear to the United States Maritime Commission to

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* By Resolution of June 16, 1942 (56 Stat. 370), the Ship Warrants Act was continued in effect for the duration of the war and six months thereafter. The Ship Warrant rules and regulations were revoked on June 6, 1946 (11 Fed. Reg. 6341), and the Act itself was repealed on July 25, 1947 (61 Stat. 449).

** Italics ours.

be necessary or expedient for the purposes of the warrant. Nothing in this Act shall authorize the United States Martime Commission to require the owner or charterer to relinquish the manning, storing, victualing, supplying, fueling, maintaining, or repairing of his vessel to any other person or persons. Nothing in this Act shall be deemed to alter, amend, or repeal any of the coastwise laws of the United States.

SEC. 3. Vessels holding warrants issued pursuant to this Act shall be entitled to priority over merchant vessels not holding such warrants, (with respect to the use of facilities for loading, discharging, lighterage or storage of cargoes, the procurement of bunker fuel or coal, and the towing, overhauling, drydocking or repair of such vessels). Vessels holding warrants shall have such priority as among themselves, as the United States Maritime Commission shall determine to be necessary and advisable in the interests of national defense, or as may be specified in the warrants. Persons in the United States, including the Philippine Islands and the Canal Zone, furnishing any of the above-mentioned facilities shall be authorized, and under rules and regulations prescribed by the United States Maritime Commission with the approval of the President may be required, to grant such priorities, anything in any contract whether heretofore or hereafter made to the contrary notwithstanding.

SEC. 4. In the administration of this Act it shall be the policy of the Commission to make fair and reasonable provision for priorities with respect to (1) the importation of substantial quantities of strategic and critical materials, (2) the transportation of substantial quantities of materials when such transportation is requested by any defense

agency, and (3) the transportation in the foreign or domestic commerce of the United States of substantial quantities of materials deemed by the Commission to be essential to the defense of the United States: *Provided,* That there shall be no unjust discrimination between ports of the United States. Nothing in this Act shall authorize the exaction of any sum from the holder of a warrant solely for the privilege of carrying cargo on any route. Vessels that on January 1, 1941, were engaged primarily in the coastwise transportation of coal for national defense and domestic consumption shall be granted warrants only so long as they continue in the same service as of said date, except that in case any such vessel ceased, before June 15, 1941, to engage in such transportation of coal and before such date became principally engaged in the transportation of defense materials, the Commission may grant such vessel a warrant for such service as it deems suitable pursuant to section 2.

SEC. 5. The term "citizen of the United States" as used in this Act includes corporations, partnerships, and associations existing, authorized, or organized under the laws of the United States or any State, district, Territory, or possession thereof.

SEC. 6. Whoever willfully violates any rule, regulation, or order issued under the authority conferred herein shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years or both: *Provided,* That the District Court of the Canal Zone and the several courts of first instance of the Commonwealth of the Philippine Islands shall have jurisdiction over offenses committed against the provisions of this Act within the Canal Zone and the Philippine Islands respectively.

Approved, July 14, 1941.

PART III.

Evidence Relating to the Admitted Purpose and Actions of the United States Maritime Commission and the War Shipping Administration to Compel an Arbitrary and Drastic Reduction of Shipping Rates Prior to Requisitioning so as to Enable Vessels to Be Requisitioned at Such Arbitrarily Reduced Rates.

The record leave no doubt of the purpose of the Maritime Commission and the War Shipping Administration to force a reduction of shipping earnings by all possible means, including coercion, and to delay requisitioning until such reduction could be effected, all with the intent of obtaining privately-owned vessels for public use at levels of rates thus reduced rather than at rates determined in accordance with the standards of just compensation required by the Fifth Amendment to the Constitution.

Among the items of evidence on the point are the following (emphasis by italics or otherwise is by us):

(a) Statements to Congress on March 30, 1943, by Marshal L. Wilcox, formerly Assistant Director, Division of Emergency Shipping, United States Maritime Commission (Def. Ex. 4, p. 168 *et seq.*):

Pp. 170-1:

> *"Early in our effort at world-wide rate control, • • • the British and ourselves agreed that neither one of us would condone time charters which were made in excess of $7.50 per ton.*
>
> "Prior to this tacit understanding between the British and ourselves, fixtures had been made at $8, $9 and $10, and some even higher, which neither the British nor ourselves were in a position to control or to have reduced.
>
> "In July 1941, • • • the Ship Warrants Act and the declaration of the unlimited national emergency

on May 27, gave the Commission some substantial background for further and more direct control over both charter rates and berth freight rates.

"The new rates promulgated by the Commission on July 30, 1941, were on the basis of $4.50 per dead-weight ton, WHICH REPRESENTED AN ARBITRARY REDUCTION *of $3 per ton under what had been more or less considered a going rate prior to that time.*

"To make this action effective or as nearly so as possible, the Commission issued press release No. 970, dated July 30, 1941, establishing the basic rate of $4.50 per ton.

"On January 5, 1942, the Commission issued press release No. 1117, which further reduced the time charter rates, effective January 20, to a basis of $3.25 per dead-weight ton per month.

"The owners objected strongly to this new reduced rate and submitted considerable data to substantiate an upward adjustment to cover increases in operating costs.

"Considerable study between January 5, 1942, and May 14, 1942, demonstrated the need for an adjustment to meet these costs. *A revised scale was established whereby rates on sailings between January 20 and May 16, 1942, would be on the basis of $3.75 per ton, and subsequent to May 15, 1942, on the basis of $4 per ton.*

"Those new rates are covered by General Order No. 8 of the War Shipping Administration which is also attached.

"The foregoing is a brief summary of the conditions with respect to ocean freight rates existing between February 1941, and May 1942, pointing out the efforts of the Maritime Commission and the War Shipping Administration to put charter rates and berth freight rates on a fair and reasonable basis."

P. 192: *"The policy of the Commission was to go along and to get the rates reduced before there*

was any requisitioning. The rates were still in the process of reduction on May 27, [1941], and they were still pretty high on May 27."

P. 214: "*Mr. Hart. You say that the Commission did not requisition* on May 27 [1941] or *until some considerable time later?*

"*Mr. Wilcox.* That is right.

"*Mr. Hart.* What was the reason for that? Let us have the reason, if you are able to state it.

"*Mr. Wilcox.* There were two reasons primarily, and one of them was this: that the rates, both time and charter, and the bareboat equivalent yield through private rates, were what in our opinion were higher. *We wanted first to get the rates down to a lower level,* and to get some voluntary contracts with shipowners to establish a considerably lower market value for vessels, *so that at the time requisitioning came in we would have a lower rate level than prevailed in April and May.* The thought behind that was that it would take maybe a few weeks or months to reduce the rates, whereas, heaven only knows how long the requisition period would last, whether 1 year or 10 years, but if it were going to last for a 10-year period *we wanted the rates at a low level so that the over-all payments by the Government would be considerably less than if we were forced into requisition at the higher rates.*

* * * * * *

"Now, *the thing we were driving at was this: In April, the time charter rates were around $10 and $10 or $12 on some fixtures, and there were many American vessels which were operating on time charter at $7 and $7.50, and there were a couple that I recall at $8, or a little bit over $8.*

"*Now, we wanted to get them down to approximately $4 or $4.50 before we got into requisitioning and* we felt that our position would be materially

strengthened in the courts and out of courts and every place else if we had voluntary agreements with owners on a $4 or $4.50 basis."

P. 215: *"Mr. Ellison. What factors were operating to make you think that by waiting the rates would be reduced?*

"Mr. Wilcox. THE BIG STICK AND THE SHOTGUN.

* * * * * *

"Mr. Wilcox. There were two procedures. In the first place, the *American owners and operators did cooperate with us splendidly. That was No. 1.*

"No. 2 was that along in July or thereabouts the Ship Warrants Act was passed prior to that time, *and the British had a Ship Warrants Act,* and the British could exercise control with their Warrants Act in places where we had no control. They could catch up with some of the ships. When our Warrants Act was effective we could control ships through our Warrants Act, we could control the rates of the vessels and so forth. *As far as the American ships were concerned,* IT WAS NOT BY AND LARGE TOO HARD TO HIT THOSE FELLOWS WITH A CLUB UNDER THE BRITISH OR THE AMERICAN WARRANTS ACT. There were some recalcitrant neutrals who had to be brought into line.

"The records will show *from the time we first started* endeavoring to catch hold of the rates *until about the first of December, which was still prior to Pearl Harbor, we had gotten the rates down to $4.50* time-charter movement. THAT IS KNOCKING OFF, ROUGHLY, $6 OF $7 A TON PER MONTH ON A TIME-CHARTER BASIS OVER A PERIOD OF ABOUT 6 OR 7 MONTHS.

"Mr. Ellison. When you had the rates reduced by the method you described was there a demand for shipping space, for the cargoes available so that the demand was there for the ships?

"*Mr. Wilcox.* YES; THERE WAS A DEMAND, AND THE DEMAND WAS CONSTANTLY INCREASING.

"*Mr. Ellison. Notwithstanding those factors that the demand was there and the shortage of ships, you were still able to get the rates down?*

"*Mr. Wilcox. That is correct.*

P. 216: "*Mr. Hart.* DID THE COMMISSION ITSELF REGARD THE WARRANTS ACT AS A COERCIVE MEASURE?

"*Mr. Wilcox.* WE REGARDED IT AS A MEASURE WHICH WOULD ENABLE US TO GET VESSELS, PARTICULARLY NEUTRAL VESSELS, TO DO WHAT WE WANTED THEM TO DO. WHEN I SAY NEUTRAL VESSELS I MEAN OTHER THAN AMERICAN VESSELS.

"*Mr. Hart.* TO GET THEM TO DO SO BY SOME PROCESS OF COERCION?

"*Mr. Wilcox.* THAT IS RIGHT, AND THE PROCESS WAS PRIORITY IN THE USE OF TERMINAL AND PORT FACILITIES.

P. 222: "*The point that I hope we are able to make is that beginning in February 1941, and up until our present time, and follow the thing projected as far as you like,* THAT THERE HAS BEEN A VERY DEFINITE EFFORT ON THE PART OF THE MARITIME COMMISSION AND THE WAR SHIPPING ADMINISTRATION TO HANDLE ALL OF THESE AFFAIRS ON A BASIS WHICH WOULD COST THE GOVERNMENT IN THE OVER-ALL PICTURE THE SMALLEST POSSIBLE AMOUNT."

(b) Statements to Congress by Admiral E. S. Land, Chairman, United States Maritime Commission, and Administrator, War Shipping Administration:

(i) On December 15, 1942, (Def. Ex. 14)—

P. 19: "*The essence of the matter,* from the Commission's standpoint *lies in the rising market* for ships since September 1939, *and the unfolding*

of the Commission's policy toward the acquisition of ships for the war effort in the face of that rising market."

P. 20: *This upswing carried top world-time charter rates to nearly $10.50 per ton before the Maritime Commission's shipping-pool plan got started under the Ship Warrants Act in the summer of 1941."*

P. 21: *"The Commission has been able to lower and flatten out these price curves through the use of its authority with respect to ship warrants and war-risk insurance.*

"This stabilization of prices and charter rates *reflects the attainment of a goal toward which the Maritime Commission had been striving ever since the responsibility devolved upon it for the acquisition and operation of ships in the national defense effort."*

Pp. 23-4: *"The Maritime Commission believes that its efforts to provide shipping for national defense and war,* without taking title from the private owners, and at stabilized, reasonable charter rates, have had and *will have the effect of saving the United States hundreds of millions of dollars* • • •."

P. 32: *"Mr. Oliver. Has the Commission exercised the requisitioning power* in any case except where ships were acquired for the use of the Army or the Navy?

• • • • • •

"Admiral Land. I would not like to answer that positively, Mr. Oliver, because *I am not sure that there might not have been some cases where we had some recalcitrant shipowners,* AND IF WE CANNOT DO ANYTHING ELSE WE CAN PUT

COMPULSION ON THEM, AND IN THAT EVENT WE WILL DO IT. THAT COMPULSION WORKED FAIRLY WELL IN SOME CASES."

(ii) On March 22, 1943, in a letter to Congressman Hart, (Def. Ex. 4)—

P. 11: (Referring to the Red Sea charter negotiations in May, 1941)—"*The alternative would have been requisitioning. The Commission wanted to avoid, or at least to postpone, the application of section 902 until there had been a further opportunity to effect a reduction of ship earnings and values.* THE COMMISSION WAS INTENT UPON EFFECTING A DOWNWARD REVISION OF THE WHOLE STRUCTURE OF RATES AND VALUES BEFORE RESORTING TO REQUISITION."

(iii) On June 10, 1943, at a hearing on Just Compensation for Requisitioned vessels held before the House Committee of the Merchant Marine and Fisheries, (Pl. Ex. 78)—

At p. 4 of the Exhibit: "PREWAR HIGH PROFIT LEVEL IN STEAMSHIP INDUSTRY HAS BEEN DESTROYED.

"There has been an erroneous tendency to assume that the steamship industry is now enjoying enormous prosperity.

"This is not true.

"High profits were earned in 1941, before we became involved in the war; but these high profits are now a thing of the past.

"Generally speaking, the 1941 prosperity was not based on moneys received from the United States Government, for we were then at peace and had not requisitioned our merchant fleet, **but rather on the great improvement in the steamship business in that year, which was world-wide in scope.** The history

of the steamship industry indicates that these peak periods occur once in 10 or 20 years. **In this case, the boom was rather short-lived, since the Maritime Commission and the War Shipping Administration rates of hire have drastically reduced steamship earnings.**

* * * * * *

P. 5: "**The existing rates * * * represent drastic reductions in the earnings and profits for the peak year of 1941, when vessel owners earned well in excess of $4 per dead-weight ton on old freighters and tankers.**

* * * * * *

P. 7: "The coordination of shipping for the national defense effort was begun by the Maritime Commission in the early part of the spring of 1941, in accordance with directives from the President. **The Commission had no specific statutory authority with which to control ship values or charter rates.** It was of the opinion, however, that such values and rates were then too high, and **it set about to reduce them to more reasonable levels, using its economic power** in the assembling of a pool of 2,000,000 tons of shipping.

"**Immediately after the adoption of the Ship Warrants Act the Maritime Commission established time-charter rates at levels of approximately $4.50 per dead-weight ton per month.** As more and more ships became subject to the new time charters, the market responded accordingly.

* * * * * *

"**This roll-back of charter rates** and sales values from the inflated levels to which they had climbed during the early months of 1941 represents the fifth phase of the sequence. It **extended from the late spring of 1941 to April 1942, when the sixth phase,**

the requisitioning of vessels, was begun by the War Shipping Administration.

"The Maritime Commission had refrained from requisitioning, as far as possible, in order to accomplish its purpose of reducing and stabilizing rates and values. By the time this objective was in hand, the War Shipping Administration, created by Executive order in February 1942, had assumed the responsibility for the acquisition and operation of vessels in the war effort."

* * * * * *

At pp. 8-9: "However, *even if the Maritime Commission had the power to requisition before May of 1941, the exercise of that power* during the high market conditions of late 1940 and early 1941 *would have been most unwise and unfortunate,* since the owners would then have been in a position to file suit in the Court of Claims for the full market values of that peak period. The results of such premature requisitioning would therefore have been very costly to the United States. *The only sound strategy was to delay the date of requisitioning as we did until rates and values could be reduced to more moderate levels.*

"Under the circumstances, the Maritime Commission determined not to resort to requisition, even after May 27, 1941, but to continue operations under private ownership *until such time as its efforts to reduce and stabilize rates and values should produce results* or the need for requisitioning should become clearer and more pressing."

"In April 1942 the War Shipping Administration ordered the requisition for use of practically the entire ocean-going merchant fleet of the United States.

"General Orders 8 and 9 were issued on May 14, 1942, and the basis of payment for vessels so requi-

sitioned was established. These orders specify a basic time charter rate of $4 per ton per month, and basic insurance values of $65 per dead-weight ton.

* * * * * *

"Generally speaking, W. S. A. rates and values approximate the levels of 1940. While they are, in some respects, higher than the rates and values prevailing in the summer of 1939, they are even more substantially lower than the levels resulting after the real scarcity of cargo space began to make itself felt in 1941."

(iv) On April 11, 1944, (Pl. Ex. 75)—

P. 464: "* * * *From 1941 to 1943,* earnings in the mining and manufacturing industry have increased nearly 50 percent over 1941 levels. During the same period *earnings in the steamship industry were reduced over 60 percent.* Whatever may be said about pre-war profits of the steamship industry, there has been so profiteering from the war itself. In fact, Pearl Harbor marked the end of high profits for this industry.

"*These results are not accidental. They reflect the persistent purpose of the Maritime Commission and the War Shipping Administration to achieve a reduction of rates* and values to moderate levels through proper exercise of the ship warrant and ship requisitioning powers in accordance with the intent of Congress that shipowners should not be allowed excessive profits in wartime. I submit that no other agency can show a more constructive job in the economic field."